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No. 07-___

IN THE

Supreme Court of the United States

DENNIS HASTY,
Petitioner,

v.

JAVAID IQBAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a supervisory official sued as an individual defendant in a *Bivens* action is entitled to qualified immunity when the plaintiff pleads only generalized and conclusory allegations in his complaint and asserts no specific facts as to that supervisory official.

PARTIES TO THE PROCEEDING

Petitioner Dennis Hasty is the former warden at the Metropolitan Detention Center in Brooklyn, New York. As such, he is a former employee of the Federal Bureau of Prisons. Hasty is a defendant in the district court and an appellant in the Court of Appeals.

Respondent Javaid Iqbal is the plaintiff in the district court and the appellee in the Court of Appeals.

The other respondents are all defendants in the district court and appellants in the Court of Appeals: John Ashcroft, former Attorney General of the United States; Robert Mueller, Director of the Federal Bureau of Investigation; Michael Rolince, former Chief of the Federal Bureau of Investigation's International Terrorism Operations Section, Counterterrorism Division; Kenneth Maxwell, former Assistant Special Agent in Charge, New York Field Office, Federal Bureau of Investigation; Kathleen Hawk Sawyer, former Director of the Federal Bureau of Prisons; David Rardin, former Director of the Northeast Region of the Federal Bureau of Prisons; Michael Cooksey, former Assistant Director for Correctional Programs of the Bureau of Prisons.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

On September 27, 2005, the United States District Court for the Eastern District of New York (Honorable John Gleeson) entered an order and memorandum opinion granting in part and denying in part Petitioner's motion to dismiss the complaint that was primarily based on Petitioner's claim of qualified immunity. The opinion is unpublished, but available as *Elmaghraby, et al. v. Ashcroft, et al.*, 04 CV 1409, 2005

WL 2375202 (E.D.N.Y. Sept. 27, 2005), reprinted in the Appendix ("App.") at 63a-145a. The United States Court of Appeals for the Second Circuit affirmed in part, reversed in part, and remanded the case on June 14, 2007. That opinion is published as *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007) and reprinted at App. 146a-215a. On September 18, 2007, the Court of Appeals denied the relevant petitions for rehearing. That Order is reprinted at App. 216a-217a.[1]

JURISDICTION

The Court of Appeals entered its opinion and judgment on June 14, 2007 and denied rehearing on September 18, 2007. This petition for a writ of certiorari is timely filed in accordance with Supreme Court Rules 13.1 and 13.3.[2]

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,

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[1] Only some of the appellants, not including Petitioner, sought rehearing. Nevertheless, "the time to file the petition for a writ of certiorari for *all parties* . . . runs from the date of the denial of rehearing." Supreme Court Rule 13.3 (emphasis added).

[2] We understand that the Solicitor General is considering whether to file a petition for a writ of certiorari on behalf of John Ashcroft and Robert Mueller, defendants in this case below, and that he has been granted a 30-day extension, to January 16, 2008, within which to file that petition.

> except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

A. Factual Background

This *Bivens* action[3] arises from the terrorist attacks of September 11, 2001. As this Court has recognized, that extraordinary event in U.S. history impelled various extraordinary and necessary responses. Among these, "Congress passed a resolution authorizing the President to 'use all necessary and appropriate force . . . to prevent any future acts of international terrorism against the United States . . . .'" *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004) (quoting Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001)).

One extension of the broad authority given to the Executive Branch was a directive from the Attorney General for federal law enforcement officials "to use

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[3] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

'every available law enforcement tool' to arrest persons who 'participate in, or lend support to, terrorist activities.'"[4] In the course of executing that order, federal officials arrested and detained over 700 aliens for violating federal immigration laws, approximately 60 percent of whom were arrested in the New York City area. OIG Report at 2, 111; App. 226a, 231a. These detainees were placed on a custody list based on the Federal Bureau of Investigation's ("FBI") suspicion that they either were linked to the terrorist attacks or "because the FBI was unable, at least initially, to determine whether they were connected to terrorism." *Id.* at 2; App. 226a.[5]

According to the OIG Report, the Federal Bureau of Prisons ("BOP"), the entity responsible for the detainees once they were arrested and processed, decided early-on to impose special conditions on the detainees. These "included housing the detainees in the administrative maximum (ADMAX) Special Housing

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[4] *See* Report of the Office of Inspector General entitled "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks" ("OIG Report") at 1; App. 225a. This April 2003 Report is a lengthy examination of the response of federal law enforcement to the events of September 11, 2001. Excerpts of the OIG Report cited in the petition are reprinted in the Appendix. A full copy of the OIG Report can be found at: <http://www.fas.org/irp/agency/doj/oig/detainees.pdf>.

[5] Although this case comes to this Court from a motion to dismiss, and the district court recognized that a motion to dismiss is evaluated on the claims averred in the Complaint, the court also recognized that "this does not mean that the complaint must be viewed in a factual vacuum," and that the court could consider information capable of judicial notice, including public records such as the OIG Report. *Elmaghraby*, 2005 WL 2375202, at *2, n.4; App. 70a.

Unit (SHU) [at the Metropolitan Detention Center ("MDC") in Brooklyn], implementing a communications blackout, and classifying the detainees as Witness Security (WITSEC) Inmates." OIG Report at 19; App. 230a. The articulated rationale for these actions was that BOP was concerned about the potential security risk of the September 11 detainees, coupled with the fact that "the FBI provided so little information about the detainees" that BOP "did not really know whom the detainees were." *Id.*; App. 230a-231a. Thus, BOP decided to "err on the side of caution and treat the September 11 detainees as high-security detainees." *Id.*; App. 231a.

At the outset, illegal alien detainees who were sent to the MDC were "subjected to the most restrictive conditions of confinement authorized by BOP policy, including a 'lockdown' for 23 hours a day, restrictive escort procedures for all movement outside of the ADMAX SHU cells, and tight limits on the frequency and duration of legal telephone calls." OIG Report at 112; App. 233a-234a. According to the BOP Director, this determination "resulted from the FBI's assessment and was not the BOP's 'call.'" *Id.*; App. 233a. As the OIG Report generally explained, detainees stayed in the ADMAX SHU until they were "cleared" by the FBI.

Among those detained was Respondent Javaid Iqbal, a citizen of Pakistan. He asserts he was arrested and detained on November 2, 2001 by Immigration and Naturalization Service ("INS") and FBI agents, and held at the MDC until his deportation on or about January 15, 2003. First Amended Complaint ("Compl.") ¶¶ 9, 80; App. 4a, 17a. He does not deny that he was in the United States in violation of federal law.

Iqbal filed his initial Complaint on May 3, 2004, in the United States District Court for the Eastern District of New York and amended it on September 30, 2004.[6] He claims that various of his constitutional and other rights were violated while he was held at the MDC. Iqbal sued the United States and numerous federal officials in their individual capacities, ranging from former Attorney General John Ashcroft to MDC correctional officers. Among those sued was Petitioner Dennis Hasty, the Warden of the MDC from the beginning of the relevant period until April 2002. Compl. ¶ 17; App. 6a.

Specifically, Iqbal claims, *inter alia*, that he was housed in the ADMAX SHU from January 8, 2002, until his release to the general population of the MDC in late July 2002. *Id.* ¶¶ 9, 81; App. 4a, 17a. He also claims the FBI made a determination that he was "of high interest" to the FBI's investigation of the September 11 terrorist attacks. *Id.* ¶ 51; App. 12a. Iqbal asserts that once he was in the ADMAX SHU, he was subjected to a variety of abuses that amounted to violations of a number of his constitutional and statutory rights. In total, he asserts twenty-one causes of action including, *inter alia*, Fifth and Eighth Amendment claims based on excessive force and conditions of confinement, and claims of conspiracy under 42

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[6] Both the district court's and appellate court's decisions were based on the First Amended Complaint. A Second Amended Complaint was filed on October 20, 2005. The allegations therein relevant to Petitioner are not materially different. Iqbal was originally joined by a second plaintiff, Ehab Elmaghraby. After the district court's ruling on the motion to dismiss, the United States settled Elmaghraby's claims as to all defendants, and he is not a party to the appeal. *See Iqbal*, 490 F.3d at 147; App. 149a.

U.S.C. § 1985(3) relating to his claims of religious discrimination and race/national origin discrimination.

Each allegation regarding Petitioner's "personal involvement," as with many of the other supervisory defendants, consists of nothing more than boilerplate language such as Petitioner "knew or should have known," about something without any specific factual allegations. *See, e.g.*, Compl. ¶¶ 124-25; App. 25a. As a result, most of the supervisory officials (all represented by separate counsel) moved to dismiss the complaint based primarily on their claim of qualified immunity, premised on the lack of sufficient allegations of their personal involvement in the violations alleged.

B. Proceedings Below

The district court, which had jurisdiction pursuant to 28 U.S.C. § 1331 and 1346(b), granted in part and denied in part the motions to dismiss on September 27, 2005. In its opinion, the district court noted that there is a tension between the liberal pleading standards of Rule 8(a) of the Federal Rules of Civil Procedure and the long line of cases holding that qualified immunity should be granted at the earliest possible stage of a case. *Elmaghraby*, 2005 WL 2375202, at *11; App. 90a. Yet, the court rejected as non-binding "dicta" the defendants' argument that this Court's decision in *Crawford-El v. Britton*, 523 U.S. 574, 598, 600 (1998), impels a Plaintiff to put forward "specific, nonconclusory factual allegations" to withstand a motion to dismiss based on qualified immunity. *Elmaghraby*, 2005 WL 2375202, at *12; App. 91a. With few exceptions, the district court denied the defendants' assertions of qualified immunity.

Several individual defendants, including Petitioner, noticed an interlocutory appeal to the Second Circuit. The Court of Appeals, in an opinion by Judge Newman, largely affirmed the district court's denial of qualified immunity. Although the court ultimately ruled against Petitioner for all but one claim, it expressed consternation over the lack of clarity in the law concerning the minimum pleading standard that is required to overcome a qualified immunity defense in a *Bivens* action. Noting that the question was unsettled in the Second Circuit, the court looked for guidance in a handful of Supreme Court decisions, but lamented that "the guidance they provide is not readily harmonized." *Iqbal*, 490 F.3d at 153; App. 161a.

The court first looked at *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), which rejected a heightened pleading standard in a civil rights action alleging municipal liability. Although the *Leatherman* holding was limited to *municipal* liability—leaving open the argument that a heightened pleading standard applied in cases against *individual* officials[7]—*Leatherman* "suggest[ed] [to the Court of Appeals] that heightened pleading standards are never permissible except when authorized by Rule 9(b) . . . ." *Iqbal*, 490 F.3d at 153; App. 162a.

The Second Circuit determined that in light of *Leatherman* and the subsequent ruling in *Swierkiewicz v. Sorema* N.A., 534 U.S. 506 (2002), an ordinary,

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[7] Indeed, some courts utilized this exception to limit *Leatherman* and to apply a heightened pleading standard to cases against individual officials. *See, e.g., Baker v. Putnal*, 75 F.3d 190, 195 (5th Cir. 1996); *Rippy v. Hattaway*, 270 F.3d 416, 424-25 n.3 (6th Cir. 2001).

garden variety Title VII discrimination case, it could not "impose heightened pleading standards in the absence of statutory authorization . . . ." 490 F.3d at 154; App. 162a-163a. It went on to note, however, that this Court's decision in *Crawford-El* indicated that "a court *could* require 'specific, nonconclusory factual allegations' at the pleading stage in claims against government officials." *Id.* (emphasis added) (quoting *Crawford-El*, 523 U.S. at 598). The Court of Appeals also noted that the relevant language from *Crawford-El* was a direct quote from Justice Kennedy's concurrence in *Siegert v. Gilley*, 500 U.S. 226, 236 (1991), in which he had explicitly advocated for a heightened pleading standard in the context of qualified immunity actions. 490 F.3d at 155; App. 165a.

The Second Circuit also considered this Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), issued only a few weeks before *Iqbal*. It observed that *Twombly* created "considerable uncertainty concerning the standard for assessing the adequacy of pleadings." 490 F.3d at 155; App. 165a. Although the court determined the scope of *Twombly* to be unclear, it recognized that the *Twombly* "holding indicated that it intended to make some alteration in the regime of pure notice pleading that had prevailed in the federal courts ever since *Conley v. Gibson*, 355 U.S. 41 (1957), was decided half a century ago." *Id.*; App. 166a. In fact, the court went so far as to say that "signals [from *Twombly*] point toward a new and heightened pleading standard." *Id.*

The Second Circuit ultimately concluded that the *Twombly* result was not a requirement that plaintiffs plead more facts than normally required in a *Bivens* case to avoid qualified immunity, but rather a "flexible 'plausibility standard.'" 490 F.3d at 157;

App. 170a. Yet the court acknowledged that it saw "some merit in the argument in favor of a heightened pleading standard in this case for two reasons":

> First, qualified immunity is a privilege that is essential to the ability of government officials to carry out their public roles effectively without fear of undue harassment by litigation. In this respect, the factors favoring a heightened pleading standard to overcome a qualified immunity defense are distinguishable from the purely prudential and policy-driven factors that the Supreme Court found inadequate to justify a heightened pleading standard in the Title VII context. *See Swierkiewicz,* 534 U.S. at 514-15, 122 S. Ct. 992.
>
> Second, some of the allegations in the Plaintiff's complaint, although not entirely conclusory, suggest that some of the Plaintiff's claims are based not on facts supporting the claim but, rather, on generalized allegations of supervisory involvement. Therefore, *allowing some of the Plaintiff's claims to survive a motion to dismiss might facilitate the very type of broad-ranging discovery and litigation burdens that the qualified immunity privilege was intended to prevent.*

Iqbal, 490 F.3d at 158 (emphasis added); App. 171a.

Still, despite its recognition that the qualified immunity context could merit a pleading standard that exceeds mere Rule 8 notice pleading, the Second Circuit concluded that its hands were tied by current precedent like *Swierkiewicz*, and the even more recent decision in *Erickson v. Pardus*, 127 S. Ct. 2197 (2007). *Iqbal*, 490 F.3d at 158; App. 171a-172a. *See Erickson*, 127 S. Ct. 2200 (holding in a 42 U.S.C. § 1983 case against a prison medical official that Rule 8(a) "requires only 'a short and plain statement of the

claim showing that the pleader is entitled to relief'") (quoting *Twombly*, 127 S. Ct. at 164). The court of appeals seemed uncomfortable with this conclusion, but determined that "[a]bsent any indication from the Supreme Court that qualified immunity might warrant an exception . . . we conclude that a heightened pleading rule may not be imposed." 490 F.3d at 158; App. 171a.

Judge Cabranes, in a concurrence, left no doubt that he believes clarification of these issues is needed from this Court. He wrote that the pertinent Supreme Court cases on this issue, as discussed above, "are less than crystal clear and ***fully deserve reconsideration by the Supreme Court at the earliest opportunity***; to say the least, 'the guidance they provide is not readily harmonized.'" *Id.* at 178 (emphasis added) (quoting Maj. Op. at 153); App. 213a. The Second Circuit ultimately concluded that the allegations of Petitioner's personal involvement in the Complaint satisfied Rule 8.

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for writ of certiorari: (1) to resolve considerable confusion among the circuit and district courts regarding the requisite pleading standard for *Bivens* cases given the inherent tension between the important policies underpinning qualified immunity, which dictate a need to resolve qualified immunity at the earliest possible stage in a case, and the liberal pleading standard of Rule 8; and (2) to ensure a correct application of the pleading standard articulated by this Court—and misapplied by the Second Circuit—governing suits against federal officers sued in their individual capacity for official acts.

I. THE PETITION SHOULD BE GRANTED TO RESOLVE CONFUSION AMONG THE LOWER COURTS REGARDING THE REQUISITE PLEADING STANDARD FOR *BIVENS* CLAIMS AND THE APPLICATION OF QUALIFIED IMMUNITY.

As the Second Circuit's opinion makes clear, there is considerable confusion in the lower courts as to how to resolve the tension between the well-established policy in favor of the early resolution of qualified immunity in a *Bivens* case versus the minimal threshold one must meet to file a complaint under Rule 8, and thus survive a motion to dismiss. This Court should grant this petition to resolve the tension in this important area of law.

Bivens cases impact thousands of government officials every year. Over the years, this Court has expressed concern about the considerable burden and distraction *Bivens* cases pose to government officials attempting to perform their official responsibilities. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 816-18 (1982); *Crawford-El*, 523 U.S. at 584-85; *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Indeed, this Court has acknowledged a myriad of concerns raised by suits against government officials in their personal capacities. *See, e.g., Crawford-El*, 523 U.S. at 584-85; *Harlow*, 457 U.S. at 816-18. Such actions not only require the shouldering of the burdens and expenses of litigation but carry heavy additional costs, such as the "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Harlow*, 457 U.S. at 816.

Thus, this Court has long recognized that courts must endeavor to protect officials from such claims

with a vigorous application of qualified immunity "at the *earliest possible stage* in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (emphasis added); *see also Scott v. Harris*, 127 S. Ct. 1769, 1774, n.2 (2007); *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001). In fact, the very "essence" of the qualified immunity doctrine is that it provides public officers with the "entitlement not to have to stand trial or face the other burdens of litigation," *Mitchell*, 472 U.S. at 526, including the "broad-reaching discovery" that can be "peculiarly disruptive of effective government." *Harlow*, 457 U.S. at 817; *see also Anderson v. Creighton*, 483 U.S. 635, 646, n.6 (1987). And because qualified immunity is "*an immunity from suit* rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526 (emphasis in original); *see also Siegert*, 500 U.S. at 233.

Given these important considerations, this Court has sought to protect government officials from baseless suits against them in their individual capacities by requiring plaintiffs to "put forward specific, nonconclusory factual allegations." *Crawford-El*, 523 U.S. at 598 (quoting *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in judgment)). This requirement enables courts to "weed out" cases lacking merit from those with potential merit. *Id.* at 593, 598. Implicitly, if not explicitly, this means that plaintiffs must allege some *facts* as to each defendant that link the official to the alleged wrong. It is simply not enough therefore to say—as Iqbal does here—that because Petitioner was the Warden at MDC he "knew or should have known" that Iqbal's constitutional rights were being violated. Compl. ¶¶ 124-25; App. 25a. To conclude otherwise, as the Court of Appeals did, undermines the purpose of qualified immunity.

Because frivolous suits are a particularly prevalent concern in the *Bivens* context, disposing of unmeritorious cases at the pleading stage is a priority. Therefore, whether a *Bivens* plaintiff has pled a claim sufficient to survive a motion to dismiss is a common, indeed recurring, question; and, as the Court of Appeals decision illustrates, the lower courts are uncertain as to the proper level of scrutiny to apply when considering such motions. The consequence of this uncertainty in most cases—especially given busy district court judges with numerous time pressures—is to err on the side of caution and permit the case to proceed to discovery. That, of course, is the antithesis of this Court's admonitions to resolve a qualified immunity defense as early as possible.

Further evidence of lower courts' uncertainty on this topic can be found in Judge Cabranes' apt observation in the concurrence below that there is an "uneasy compromise . . . between a qualified immunity privilege rooted in the need to preserve 'the effectiveness of government as contemplated by our constitutional structure,' . . . and the pleading requirements of Rule 8(a) . . . ." *Iqbal*, 490 F.3d at 178 (Cabranes, J., concurring) (quoting *Harlow*, 457 U.S. at 820 n.35); App. 213a. Although this Court has addressed pleading standards in many cases, "the guidance they provide is not readily harmonized"—especially in the *Bivens* context. *Id.* at 153; App. 161a. Indeed, as Judge Cabranes further noted, even with the "discovery safeguards" identified in the Second Circuit's opinion to strike a balance in this case, "it seems that little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting

our nation from future attacks to submit to prolonged and vexatious discovery processes." 490 F.3d at 179; App. 215a.

Despite these clear articulations of the problem by the Court of Appeals, the Second Circuit believed it was at the same time constrained by the totality of several relatively recent decisions of this Court to deny qualified immunity here—even in the face of a complaint woefully devoid of alleged facts as to Petitioner. As the Second Circuit found, an analysis of this Court's relevant decisions underscores the confusion that exists—and the Second Circuit faced—about the appropriate standard to apply to *Bivens* cases such as this.

First, as noted by the Second Circuit, this Court's *Leatherman* decision failed to resolve "whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." 507 U.S. at 167 (emphasis added). As a result, several circuits continued to apply a heightened pleading requirement for cases against *individual* government officials. *See, e.g.*, note 7, *supra*. Five years later, this Court considered *Crawford-El*, a 42 U.S.C. § 1983 case involving claims against individual officials and their assertion of qualified immunity. *Crawford-El* did not address pleading standards, *per se*, but did address whether a "clear and convincing burden of proof" could be imposed at the summary judgment stage. 523 U.S. at 594. Although *Crawford-El* provided some clarity by rejecting the use of a "heightened standard of proof" in constitutional tort claims, it also sought to preserve the notion that something more than bare facts (or no facts) is required for a plaintiff to withstand a qualified immunity defense. This Court ex-

plained that courts may "insist that [a] plaintiff 'put forward specific, nonconclusory factual allegations' . . ." at the pleading stage. *Id.* at 598 (citation omitted).

Then, in 2002, this Court issued *Swierkiewicz*, holding that a heightened pleading standard imposed by the Second Circuit in a Title VII discrimination case conflicted with Rule 8 of the Federal Rules of Civil Procedure and could not be enforced. 534 U.S. at 515. Although *Swierkiewicz* seems more definitive than *Leatherman* and *Crawford-El*, it was a Title VII employment discrimination case, not a *Bivens* case, and thus not a situation where strong policy reasons counsel for specific facts and prompt resolution. Still, *Swierkiewicz* stated that the simplified Rule 8 pleading standard "applie[s] to all civil actions, with limited exceptions," 534 U.S. at 513; and, as a result, many courts have since applied *Swierkiewicz* well beyond the Title VII context, including in civil rights cases.[8]

Certainly, after *Swierkiewicz* the pleading standard for *Bivens* cases was not always clear. Because *Swierkiewicz* was not a *Bivens* or § 1983 case, the "specific, nonconclusory factual allegations" language from *Crawford-El* was not disturbed. Indeed, courts

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[8] *See Educadores Puertorriqueños En Acción v. Hernandez*, 367 F.3d 61, 65 (1st Cir. 2004) ("[w]hatever window of opportunity [to impose heightened pleading] we thought remained after *Crawford-El* has been slammed shut by . . . *Swierkiewicz*"). Indeed, according to *Doe v. Cassel*, 403 F.3d 986 (8th Cir. 2005), by 2005, at least eight of the Circuits had adopted the *Swierkiewicz* rule that the "only permissible heightened pleading requirements in civil suits are those contained in the Federal Rules of Civil Procedure or those in federal statues." *Id.* at 989, n.3.

continued to apply this language as a pleading standard in *Bivens* and § 1983 cases even *after Swierkiewicz*, which suggests that the bare notice pleading standard in *Swierkiewicz* was not necessarily definitive for these types of cases. *See, e.g., Ruffin v. Nicely*, 183 Fed. Appx. 505, 510 n.1 (6th Cir. 2006); *Powers-Bunce v. District of Columbia*, 479 F. Supp. 2d 146, 158 (D.D.C. 2007); *Scott v. Garcia*, 370 F. Supp. 2d 1056, 1072 (S.D. Cal 2005). Even though the *Crawford-El* standard is not a "heightened pleading standard," *per se*, these courts discussed the *Crawford-El* standard differently than the simplified Rule 8(a) standard applied in *Swierkiewicz*. 534 U.S. at 512. In addition, even *after Swierkiewicz*, at least one circuit court still applied "heightened pleading requirements" to a *Bivens* case. *See Gonzalez v. Reno*, 325 F.3d 1228, 1235 (11th Cir. 2003). Clearly, *Swierkiewicz* did little to resolve all of the questions regarding the requisite pleading standard for a *Bivens* case.

Against this backdrop, the *Twombly* decision appeared to inject new life into the notion that something more than generalized conclusory statements of fact is required in a *Bivens* case to survive a qualified immunity motion. Indeed, in light of *Twombly* and the introduction of the "plausibility standard," the question of how to handle a *Bivens* complaint where defendants assert qualified immunity is more jumbled than ever. Following *Twombly*, numerous lower courts across the country have scrambled to reevaluate their pleading requirements. Some courts have viewed *Twombly* as being a significant change in the

pleading standard of Rule 8,[9] while others have treated it as merely reinforcing *Swierkiewicz*.[10]

Finally, this Court's decision in *Erickson*—which involved § 1983 claims against government officials and was issued two weeks after *Twombly*—only added to the confusion. On the one hand, the Court in *Erickson* noted that on a motion to dismiss, "specific facts are not necessary," only "fair notice." 127 S. Ct at 2200. On the other hand, the court cited *Twombly* for this proposition yet failed to address *Twombly's* new plausibility standard. Thus, courts will continue to struggle to interpret the ultimate effect of *Twombly* and *Erickson*, as the Second Circuit did.

After years of confusion and conflicts over the appropriate pleading standard for *Bivens* cases, this Court should seize the opportunity presented by the instant Petition to provide clear guidance on an issue of vital importance to thousands of public officials who have been or might be sued in their individual

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[9] *See, e.g., Schafer v. State Farm Fire & Cas. Co.*, 507 F. Supp. 2d 587, 596, n.26 (E.D. La. 2007) (*Twombly* is a "clear and visible departure from the liberal federal pleading standards"); *Ansell v. United States*, No. 2:05-cv-505, 2007 WL 2593777, at *1 (W.D. Pa. Sept. 4, 2007) (*Twombly* "may represent a sweeping change in the pleading standard applicable to complaints filed in federal court"); *Garvais v. United States*, No. cv-03-0290-JLQ, 2007 WL 1724956, at *8 (E.D. Wash. June 11, 2007) (*Twombly* represents a "stricter pleading standard"); *Hackman v. Dickerson Realtors, Inc.*, No. 06 C 50240, 2007 WL 2570297, at *11(N.D. Ill Aug. 31, 2007) (post-*Twombly*, "federal pleading requires more than just a short and plain statement of the facts").

[10] *See Lindsay v. Yates*, 498 F.3d 434, 440, n.6 (6th Cir. 2007); *Airborne Beepers & Video, Inc., v. AT&T Mobility LLC*, 499 F.3d 663, 667 (7th Cir. 2007); *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 782 & n.4 (7th Cir. 2007).

capacities for their official actions. Indeed, it is an issue that "fully deserve[s] reconsideration by the Supreme Court at the earliest opportunity." *Iqbal*, 490 F.3d at 178 (emphasis added) (Cabranes, J. concurring); App. 213a. Therefore, certiorari should be granted to address and clarify these important principles of federal law.

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S PRECEDENTS REGARDING PLEADING REQUIREMENTS GENERALLY, AS WELL AS PLEADING CLAIMS AGAINST GOVERNMENT OFFICIALS.

Although the Second Circuit discussed at some length this Court's *Twombly* and *Crawford-El* rulings, as well as other related decisions, it ultimately misapplied the standards articulated in those cases, at least as to Petitioner. By holding that Iqbal's conclusory allegations—devoid of any facts indicating Petitioner's personal involvement in the asserted conduct—were sufficient to survive the pleadings stage, the Second Circuit, like the district court before it, essentially nullified the very concept of qualified immunity established by this Court to protect *Bivens* defendants like Petitioner.[11]

Both in the *Bivens* context and more generally, this Court has made clear that a plaintiff must do more than merely articulate a legal standard to survive a

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[11] As the Second Circuit correctly noted, it is appropriate to consider the level of a government official's personal involvement during a qualified immunity interlocutory appeal because "it goes to the question of whether a defendant's actions violated a clearly established right." *Iqbal*, 490 F.3d at 153 (citation omitted); App. 160a

motion to dismiss. Indeed, this Court's recent *Twombly* ruling reiterates that conclusory allegations are insufficient: "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[12] 127 S. Ct. at 1964-65 (citation omitted). Rather, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 1965. Importantly, a plaintiff must make "a 'showing,' rather than a blanket assertion, of entitlement to relief." *Id.*, n.3 (citation omitted).

Twombly articulated the pleading standard as one of, as the Court of Appeals noted, "plausibility." 490 F.3d at 157; App. 170a. In *Twombly*, this Court explained that "[a]sking for *plausible grounds* to infer an agreement [of conspiracy] does not impose a probability requirement at the pleading stage; . . ." it simply requires the plaintiff to "indentify[ ] facts that are *suggestive enough* to render [the claim] plausible . . . ." 127 S. Ct. at 1965 (emphasis added). In

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[12] Although *Twombly* involved the dismissal of a Sherman Act case, the manner in which this Court eviscerated the 50-year-old *Conley v. Gibson* civil pleading standard, which had been universally cited in *all* types of civil actions, left little doubt that the scope of the ruling extends well beyond the antitrust context. *Twombly*, 127 S. Ct. at 1969 ("the [Conley pleading] phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard"). Indeed, in the six months since the *Twombly* ruling, federal courts of appeals and district courts too numerous to list have cited the new *Twombly* pleading standard for virtually all types of civil cases. *See also Iqbal*, 490 F.3d at 157, n.7; App. 170a ("it would be cavalier to believe that the Court's rejection of the 'no set of facts' language from *Conley*, which has been cited by federal courts at least 10,000 times in a wide variety of contexts (according to a Westlaw search), applies only to section 1 antitrust claims").

analyzing the requirements for pleading an antitrust conspiracy, this Court held that "[t]he need at the pleading stage for allegations plausibly suggesting (*not merely consistent with*) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" *Id.* at 1966 (emphasis added). Therefore, instead of allegations that are *merely consistent with* a right to relief, a plaintiff must plead facts that are *suggestive* enough to cross over "the line *between possibility and plausibility* of 'entitle[ment] to relief.'" *Id.* (emphasis added) (citation omitted). That standard, or something akin to it, that requires pleading with factual specificity in a *Bivens* complaint, is essential to maintaining fidelity to this Court's admonition that qualified immunity be resolved as early as possible in a case.

Had such a standard been applied here, contrary to what the Court of Appeals held, Iqbal's allegations as to Petitioner would be found to be insufficient; they lack the factual detail to shift his claims against Petitioner from *possible* to *plausible*. The Complaint's references to Hasty are extremely limited and discrete and are the epitome of conclusory allegations devoid of substance. Consider, for example, the allegations as to excessive force and conspiracy:

> After describing several specific incidents of excessive force involving named correctional officers, with dates and locations, Compl. ¶¶ 113-122; App. 23a-25a, Iqbal then lumps Hasty in by stating that "[t]he beatings of Mr. IQBAL by MDC staff were all pursuant to the customs and practices of the MDC. Such unlawful customs and practices were known or should have been known to Defendants HASTY, ZENK, THOMAS, SHERMAN, and

> LOPRESTI, who with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity." Compl. ¶ 124; App. 25a.
>
> For the conspiracy claims, Iqbal merely lumps Hasty into a group of 11 defendants, saying that they "agreed" to commit constitutional violations, but gives no factual background on the alleged "agreement": "Defendants ASHCROFT, MUELLER, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI and SHACKS each knew of, condoned, and willfully and maliciously agreed to subject Plaintiffs to these conditions of confinement . . . . Defendants, by engaging in the following conduct, agreed to deprive Plaintiffs of the equal protection of the laws and of equal privileges and immunities of the law. . . [listing alleged constitutional violations] . . . ." Compl. ¶¶ 96, 247; App. 20a, 53a-54a.

In light of these allegations, the Court of Appeals failed to apply properly the qualified immunity analysis to Petitioner, essentially finding that if Iqbal pled bare allegations of misconduct and Petitioner's "involvement" in them, qualified immunity must be denied. Yet, on their face, Iqbal's allegations are unsupported by any facts; instead, they are based solely on Petitioner's position as Warden at the MDC. Importantly, the doctrine of *respondeat superior* does not apply in a *Bivens* action. *See Monell v. Dept. of Social Servs. of City of New York*, 436 U.S. 658, 691 (1978) (rejecting *respondeat superior* in the § 1983

context).[13] Despite this well-settled case law, it is clear from a review of the allegations as to Petitioner that this is precisely the basis for holding Petitioner liable for the conduct alleged in the Complaint.

Indeed, nothing can be gleaned from the allegations indicating that Petitioner actually "knew or should have known" that the alleged underlying conduct was occurring. Iqbal only offers an unsupported summary conclusion to that effect. Compl. ¶¶ 124-25; App. 25a. There is no allegation that explains with *any* detail how Hasty acted with the requisite complicity in the alleged conduct and "failed" adequately to curtail it. *Id.* In fact, Iqbal failed to allege *any* fact concerning the time, place, or manner of Hasty's personal involvement in the alleged violations. *Cf. Twombly*, 127 S. Ct. at 1971, n.10. In total, the Complaint contains nothing but vague and factually unsupported allusions to legal standards—for example, that Hasty established "customs and practices" of abuse, he "knew or should have known" of abuse, and that he acted with "deliberate indifference and/or reckless disregard."[14] Such boilerplate catchphrases are merely restatements of the operative legal standard, and, as noted above, "a formulaic recitation of the elements of a

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[13] Although *Monell* is a § 1983 case and not *Bivens*, "the qualified immunity analysis is identical under either cause of action." *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

[14] Significantly, almost all of Plaintiff's boilerplate allegations that attempt to establish Petitioner's personal involvement are lumped together with the alleged "actions" of other supervisory defendants, sometimes numbering as many as *eleven* defendants. *See, e.g.*, Compl. ¶ 96; App. 20a.

cause of action will not do."[15] *Id.* at 1965 (citation omitted). This constitutes the exact type of "artful pleading" this Court warned against in *Harlow*. 457 U.S. at 808.[16]

The Second Circuit erred in holding that Iqbal's allegations regarding Hasty meet the plausibility standard established by *Twombly* and informed by *Harlow* and its progeny. For example, as to Iqbal's excessive force claims, the court explained its decision by saying "it is at least plausible that a warden would know of mistreatment inflicted by those under this command." 490 F.3d at 170; App. 195a-196a. Although it is certainly *possible* that Hasty would know of abuse committed by other defendants far down the chain of command, an allegation that is "merely consistent with" an entitlement to relief "stops short of the line between possibility and *plausibility*." *Twombly*, 127 S. Ct. at 1966 (emphasis added). Indeed, under the Court of Appeals' view, where a bare allegation of *knowledge* satisfies the plausibility test, a warden would face liability for virtually *anything* that happens within his prison, regardless of his actual connection to the act. If a *Bivens* plaintiff can make it to discovery by merely alleging that a supervisory official likely had knowledge—"without some further factual enhance-

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[15] The legal standard for personal involvement in the Second Circuit is set forth in *Williams v. Smith*, 781 F.2d 319, 323 (2d Cir. 1986), and many of Iqbal's allegations consist of an almost verbatim rehashing of the standard from this case.

[16] Further exposing Plaintiff's lack of specific factual allegations against Hasty is that Iqbal *does* make a specific allegation against Hasty's successor as Warden, Michael Zenk. Iqbal claims that Zenk called him a "terrorist," which allegedly demonstrated Zenk's animus. Compl. ¶ 87; App. 18a.

ment,"[17] *id.*—then *Harlow's* pledge of protection for government officials is an illusory and empty promise.

For the conspiracy claims, the Court of Appeals found the plausibility standard was satisfied even though there were only bare allegations that the defendants "agreed" to deprive Iqbal of his constitutional rights. Furthermore, the "agreements" to which Hasty was purportedly a party were alleged to have taken place between no less than *eleven* defendants, ranging from the Attorney General of the United States down to a correctional officer. While it may have been "possible" that such agreements existed, Iqbal has failed to allege *any* fact *plausibly* suggesting that they did. This failure presents precisely the scenario rejected by this Court in *Twombly*.

Moreover, only four of Iqbal's conspiracy allegations actually provide a *date* where the alleged agreement took place, and *Hasty is conspicuously absent from these allegations*. Compl. ¶¶ 247, 250; App. 53a-56a. Notably, one of the key deficiencies of the conspiracy claim in *Twombly* was that "the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies." 127 S. Ct at 1971, n.10. *Twombly* also stated that the plausibility standard "requires a complaint with enough *factual matter* (taken as true) to suggest that an agreement was made." *Id.* at 1965 (emphasis added). And, most importantly, "a conclusory *allegation of agreement* at some unidentified point does not supply facts

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[17] For example, *if* there had been an allegation that Hasty knew of the abuse because he received written complaints, it would give "further factual enhancement" to support Iqbal's otherwise-bare allegation. No such allegation exists.

adequate to show illegality." *Id.* at 1966 (emphasis added). The Complaint here contains no *factual* basis that there even was an agreement—it merely contains "conclusory allegation[s] of agreement"—and, thus, these allegations do not meet the plausibility standard. All of these factors demonstrate that the conspiracy allegations should not have survived Petitioner's motion to dismiss.

The excessive force and conspiracy claims are just two examples of the deficiencies of the Complaint, which as a whole, fails to meet the *Twombly* plausibility standard with regard to Petitioner. And the Complaint certainly does not meet the *Crawford-El* condition of "specific, nonconclusory factual allegations." This Court has emphasized that courts should "tak[e] care to require allegations" that meet the Federal Rules' threshold requirements. *Twombly*, 127 S. Ct at 1967. When the requirements of Rule 8, as clarified by *Twombly*, are applied here, it is clear that Iqbal has not satisfied his burden and cannot proceed against Petitioner. Accordingly, it was error for the Second Circuit to hold otherwise.

This Court should grant review to correct this error and to clarify the scope of *Crawford-El's* and *Twombly's* requirements for actions against a public official in his or her personal capacity. Allowing this case to proceed now to discovery, with all the attendant costs and burden that process entails, would effectively deny Petitioner the immunity to which he is entitled. *See Mitchell*, 472 U.S. at 526 (qualified immunity is an "immunity form suit," not merely a defense to liability).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 17, 2007

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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04 CV 1809 (JG)(JA)

EHAB ELMAGHRABY and JAVAID IQBAL,
Plaintiffs,

against

JOHN ASHCROFT, Attorney General of the United States; ROBERT MUELLER, Director of the Federal Bureau of Investigation; MICHAEL ROLINCE, Former Chief of the Federal Bureau of Investigation's International Terrorism Operations Section, Counterterrorism Division; KENNETH MAXWELL, Former Assistant Special Agent in Charge, New York Field Office, Federal Bureau of Investigation; KATHLEEN HAWK SAWYER, former Director of the Federal Bureau of Prisons; DAVID RARDIN, Former Director of the Northeast Region of the Bureau of Prisons; MICHAEL COOKSEY, Former Assistant Director for Correctional Programs of the Bureau of Prisons; DENNIS HASTY, former Warden of the Metropolitan Detention Center; MICHAEL ZENK, Warden of the Metropolitan Detention Center; LINDA THOMAS, former Associate Warden of Programs of the Metropolitan Detention Center; ASSOCIATE WARDEN SHERMAN, Associate Warden of Custody for the Metropolitan Detention Center; CAPTAIN SALVATORE LOPRESTI; LIEUTENANT STEVEN BARRERE; LIEUTENANT WILLIAM BECK; LIEUTENANT LINDSEY BLEDSOE; LIEUTENANT JOSEPH CUCITI; LIEUTENANT THOMAS CUSH; LIEUTENANT HOWARD

GUSSAK; LIEUTENANT MARCIAL MUNDO; LIEUTENANT DANIEL ORTIZ; LIEUTENANT ELIZABETH TORRES; CORRECTIONS OFFICER REYNALDO ALAMO; CORRECTIONS OFFICER SYDNEY CHASE; CORRECTIONS OFFICER JAMES CLARDY; CORRECTIONS OFFICER RAYMOND COTTON; CORRECTIONS OFFICER MICHAEL DEFRANCISCO; CORRECTIONS OFFICER RICHARD DIAZ; CORRECTIONS OFFICER JAI JAIKISSON; CORRECTIONS OFFICER DEXTER MOORE; CORRECTIONS OFFICER JON OSTEEN; CORRECTIONS OFFICER ANGEL PEREZ; CORRECTIONS OFFICER SCOTT ROSEBERRY; UNIT MANAGER CLEMMETT SHACKS; NORA LORENZO, Physician's Assistant; "JOHN DOE" CORRECTIONS OFFICERS NOS. 1-19, "John Doe" being fictional first and last names; and the UNITED STATES OF AMERICA.

Defendants.

FIRST AMENDED COMPLAINT
AND JURY DEMAND

Plaintiffs EHAB ELMAGHRABY and JAVAID IQBAL, by their attorneys, the Urban Justice Center and Koob & Magoolaghan, allege upon knowledge as to themselves and upon information and belief as to all other matters as follows:

NATURE OF ACTION

1. This is an action brought by Plaintiffs EHAB ELMAGHRABY and JAVAID IQBAL to remedy the brutal mistreatment and discrimination each Plaintiff suffered while in the care, custody, and control of Defendants. Plaintiffs ELMAGHRABY and IQBAL are Muslim men from Egypt and Pakistan, respectively. In the months after September 11, 2001,

Plaintiffs were detained at the Metropolitan Detention Center ("MDC") in Brooklyn, New York. Plaintiffs were arbitrarily classified as being "of high interest" to the government's terrorism investigation after September 11th, and accordingly were housed in the MDC's Administrative Maximum ("ADMAX") Special Housing Unit ("SHU").

2. While in the ADMAX SHU, Plaintiffs were subjected to a pattern and practice of cruel, inhuman, and degrading treatment in violation of the First, Fourth, Fifth, Sixth, and Eighth Amendments to the United States Constitution, federal statutory law, and customary international law. Among other things, they were deliberately and cruelly subjected to numerous instances of excessive force and verbal abuse, unlawful strip and body cavity-searches, the denial of medical treatment, the denial of adequate nutrition, extended detention in solitary confinement, the denial of adequate exercise, and deliberate interference with their rights to counsel and to exercise of their sincere religious beliefs. They were placed in tiny cells for more than 23 hours per day, and strip-searched, manacled and shackled when removed from their cells. Plaintiffs were housed in the ADMAX SHU in the absence of adequate standards or procedures for determining that such a classification was appropriate, or that the classification should continue, in violation of the Fifth Amendment to the United States Constitution.

3. Plaintiffs were singled out for such mistreatment because of their race, national origin, and religion. Defendants, by creating, participating in, and endorsing Plaintiffs' systematic mistreatment, violated the principles enunciated in *Bivens v. Six Unknown Named Agents of Federal Bureau of Nar-*

cotics, 403 U.S. 388 (1971), the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, the civil rights conspiracy statute, 42 U.S.C. § 1985(3), and the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq.

4. As a result of Defendants' misconduct, Plaintiffs suffered severe and permanent physical injuries, and severe emotional distress and humiliation. Plaintiffs now bring this lawsuit to redress these wrongs and to seek just and fair compensation.

JURISDICTION AND VENUE

5. This action is brought pursuant to *Bivens*, under the First, Fourth, Fifth, Sixth, and Eighth Amendments to the United States Constitution, 28 U.S.C. § 1346(b), 28 U.S.C. §1350, and 42 U.S.C. §§ 1985(3) and 2000bb.

6. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1346(b), and 1350.

7. Venue is proper in the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. § 1391(b), as the events giving rise to this action occurred within this district.

PARTIES

8. Plaintiff EHAB ELMAGHRABY is a native and citizen of Egypt, where he currently resides. He was detained in the MDC from on or about October 1, 2001 to on or about August 28, 2002.

9. Plaintiff JAVAID IQBAL is a native and citizen of Pakistan, where he currently resides. He was detained in the MDC from on or about November 5, 2001 to on or about January 15, 2003.

10. Defendant JOHN ASHCROFT is the Attorney General of the United States. As Attorney General, Defendant ASHCROFT has ultimate responsibility for the implementation and enforcement of the immigration and federal criminal laws. He is a principal architect of the policies and practices challenged here. He authorized, condoned, and/or ratified the unreasonable and excessively harsh conditions under which Plaintiffs were detained.

11. Defendant ROBERT MUELLER is the Director of the Federal Bureau of Investigation ("FBI"). As FBI Director, he was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged here.

12. Defendant MICHAEL ROLINCE was at all relevant times the Chief of the FBI's International Terrorism Operations Section, Counterterrorism Division, and as such was instrumental in the implementation of the policies and practices challenged here.

13. Defendant KENNETH MAXWELL was at all relevant times the Assistant Special Agent in Charge, New York Field Office, FBI and as such was instrumental in the implantation of the polices and practices challenged here.

14. Defendant KATHLEEN HAWK SAWYER was at all relevant times the Director of the Federal Bureau of Prisons. As such, Defendant SAWYER was responsible for the custody, care and control of the individuals detained in the MDC, including Plaintiffs, and was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged here. She authorized, condoned and/or ratified the unreasonable and excessively harsh conditions under which Plaintiffs were detained.

15. Defendant DAVID RARDIN was at all relevant times the Director of the Northeast Region of the Bureau of Prisons. As such, Defendant RARDIN was responsible for the custody, care and control of the individuals detained in the MDC, including Plaintiffs, and was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged here. He authorized, condoned and/or ratified the unreasonable and excessively harsh conditions under which Plaintiffs were detained.

16. Defendant MICHAEL COOKSEY was at all relevant times the Assistant Director for Correctional Programs of the Bureau of Prisons. As such, Defendant COOKSEY was responsible for ensuring a safe and secure institutional environment for the individuals detained in the MDC, including Plaintiffs, and was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged here. He authorized, condoned and/or ratified the unreasonable and excessively harsh conditions under which Plaintiffs were detained.

17. Defendant DENNIS HASTY was at some relevant times the Warden of the MDC. While Warden, Defendant HASTY was responsible for the terms and conditions under which Plaintiffs were confined at the MDC, and for supervising, hiring, and training officers who brutalized and mistreated Plaintiffs. While Warden, Defendant HASTY subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

18. Defendant MICHAEL ZENK is currently the Warden of the MDC. As Warden, Defendant ZENK was responsible at some relevant times for the terms and conditions under which Plaintiffs were confined at the MDC, and for supervising, hiring, and training

officers who brutalized and mistreated Plaintiffs. As Warden, Defendant ZENK subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

19. Defendant LINDA THOMAS is the former Associate Warden of Programs of the MDC and was at all relevant times the Associate Warden of Programs of the MDC. While Associate Warden, Defendant THOMAS was responsible for the terms and conditions under which Plaintiffs were confined at the MDC, and for supervising, hiring, and training officers who brutalized and mistreated Plaintiffs. As Associate Warden, Defendant THOMAS subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

20. Defendant SHERMAN is the Associate Warden of Custody of the MDC and was at all relevant times the Associate Warden of Custody of the MDC. While Associate Warden, Defendant SHERMAN was responsible for the terms and conditions under which Plaintiffs were confined at the MDC, and for supervising, hiring, and training officers who brutalized and mistreated Plaintiffs. As Associate Warden, Defendant SHERMAN subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

21. Defendant Captain SALVATORE LOPRESTI is and was at all relevant times employed at the MDC. While Captain, Defendant LOPRESTI was responsible for the terms and conditions under which Plaintiffs were confined at the MDC, and for supervising and training officers who brutalized and mistreated Plaintiffs. As Captain, Defendant LOPRESTI subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

22. Defendant Lieutenant STEVEN BARRERE is and was at all relevant times a federal corrections officer employed at the MDC. Defendant BARRERE subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

23. Defendant Lieutenant WILLIAM BECK is and was at all relevant times a federal corrections officer employed at the MDC. Defendant BECK subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

24. Defendant Lieutenant LINDSEY BLEDSOE is and was at all relevant times a federal corrections officer employed at the MDC. Defendant BLEDSOE subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

25. Defendant Lieutenant JOSEPH CUCITI was at all relevant times a federal corrections officer employed at the MDC. Defendant CUCITI subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

26. Defendant Lieutenant THOMAS CUSH is and was at all relevant times a federal corrections officer employed at the MDC. Defendant CUSH subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

27. Defendant Lieutenant HOWARD GUSSAK was at all relevant times a federal corrections officer employed at the MDC. Defendant GUSSAK subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

28. Defendant Lieutenant MARCIAL MUNDO is and was at all relevant times a federal corrections officer employed at the MDC. Defendant MUNDO

subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

29. Defendant Lieutenant DANIEL ORTIZ is and was at all relevant times a federal corrections officer employed at the MDC. Defendant ORTIZ subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

30. Defendant Lieutenant ELIZABETH TORRES is and was at all relevant times a federal corrections officer employed at the MDC. Defendant TORRES subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

31. Defendant REYNALDO ALAMO is and was at all relevant times a corrections officer employed at the MDC. Defendant ALAMO subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

32. Defendant SYDNEY CHASE is and was at all relevant times a corrections officer employed at the MDC. Defendant CHASE subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

33. Defendant JAMES CLARDY is and was at all relevant times a corrections officer employed at the MDC. Defendant CLARDY subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

34. Defendant RAYMOND COTTON is and was at all relevant times a corrections officer employed at the MDC. Defendant COTTON subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

35. Defendant MICHAEL DEFRANCISCO was at all relevant times a federal corrections officer employed at the MDC. Defendant DEFRANCISCO subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

36. Defendant RICHARD DIAZ is and was at all relevant times a federal corrections officer employed at the MDC. Defendant DIAZ subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

37. DEFENDANT JAI JAIKISSON is and was at all relevant times a federal corrections officer employed at the MDC. Defendant JAIKISSON subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

38. Defendant DEXTER MOORE is and was at all relevant times a federal corrections officer employed at the MDC. Defendant MOORE subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

39. Defendant JON OSTEEN was at all relevant times a federal corrections officer employed at the MDC. Defendant OSTEEN subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

40. Defendant ANGEL PEREZ is and was at all relevant times a federal corrections officer employed at the MDC. Defendant PEREZ subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

41. Defendant SCOTT ROSEBERRY is and was at all relevant times a federal corrections officer employed at the MDC. Defendant ROSEBERRY sub-

jected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

42. Defendant CLEMMETT SHACKS is and was at all relevant times a federal corrections officer employed at the MDC. Defendant SHACKS was the Unit Manager for the ADMAX SHU. Defendant SHACKS subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

43. Defendant NORA LORENZO is and was at all relevant times a physician's assistant employed at the MDC and was at all relevant times responsible for the delivery of medical care to Plaintiffs.

44. Defendants "JOHN DOE" CORRECTIONS OFFICERS NOS. 1-19, "John Doe" being fictional first and last names, are and were at all relevant times federal corrections officers employed at the MDC. Defendants DOE Nos. 1-19 subjected Plaintiffs to unreasonable and excessively harsh conditions of confinement.

45. Defendant UNITED STATES OF AMERICA, by virtue of the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., is liable for the tortuous conduct of the individual Defendants named herein, including assault, battery, negligence, and intentional infliction of emotional distress.

46. All Defendants named herein acted under color of federal law and within the scope of their office or employment.

STATEMENT OF FACTS

General Background

47. In the months after September 11, 2001, the Federal Bureau of Investigation ("FBI"), under the direction of Defendant MUELLER, arrested and de-

tained thousands of Arab Muslim men, designated herein as "post-September 11th detainees," as part of its investigation of the events of September 11.

48. Many of these men, including Plaintiffs, were classified as being "of high interest" to the government's post-September-11th investigation by the FBI without specific criteria or a uniform classification system.

49. In many cases, including Plaintiffs', the classification was made because of the race, religion, and national origin of the detainees, and not because of any evidence of the detainees' involvement in supporting terrorist activity.

50. Defendants ROLINCE and/or MAXWELL were responsible for making the initial determination as to whether detainees arrested within the New York area in the weeks and months after September 11 were classified as "of high interest" to the government's investigation.

51. Defendants ROLINCE and/or MAXWELL classified Mr. Elmaghraby and Mr. Iqbal as "of high interest" to the post-September-11th investigation because of their race, religion, and national origin, and not because of any evidence that Plaintiffs were involved in terrorist activity.

52. Indeed, within the New York area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks—however unrelated the arrestee was to the investigation—were immediately classified as "of interest" to the post-September-11th investigation.

53. Those post-September 11th detainees classified by the FBI as being "of high interest" were confined

at the MDC in Brooklyn, New York, in the ADMAX SHU, which is the Federal Bureau of Prisons' ("BOP") most restrictive type of confinement.

54. The ADMAX SHU was quickly created on MDC's ninth floor to house post- September 11th detainees.

55. Prior to September 11, 2001, the MDC had a SHU, but not an ADMAX SHU.

56. The MDC had as many as 60 detainees housed in the ADMAX SHU at one time.

57. The officers who worked on the ADMAX SHU were selected by Defendants HASTY, SHERMAN, and LOPRESTI.

58. The procedures for handling detainees on the ADMAX SHU were developed by Defendants SHERMAN, LOPRESTI, and CUCITI, at the request of Defendant HASTY.

59. The ADMAX SHU enforced a four-man hold restraint policy, the use of hand-held cameras to record detainee movements, cameras in each cell to monitor detainees, and physical security enhancements.

60. Post-September 11th detainees in the ADMAX SHU were subjected to highly restrictive conditions of confinement. They were not permitted to move about the unit, use the telephone freely, nor were they permitted any electronic equipment in their cells, such as small radios. Post-September 11th detainees moved outside their cells only when they were restrained with handcuffs and leg irons and escorted by four staff members.

61. For many weeks, post-September 11th detainees in the ADMAX SHU were subjected to a

communications blackout that barred them from receiving telephone calls, visitors, mail, and from placing telephone calls. During this period, the post-September 11th detainees, including Plaintiff ELMAGHRABY, were unable to make any contact with their attorneys or families.

62. Compounding this situation, MDC employees often turned away lawyers and family members who came to visit individual post-September 11th detainees by falsely stating that the individual detainee was no longer detained in the MDC.

63. Markedly different from the conditions in the MDC 's general population, detainees in the ADMAX SHU were permitted to leave their cells for only one hour a day, at most, and their legal and social visits were non-contact, with a clear partition between the parties.

64. Because of the highly restrictive nature of the ADMAX SHU, BOP regulations require an employee known as the Segregation Review Official to conduct a weekly review of the status of each inmate housed in the SHU after he has spent seven days in administrative detention or disciplinary segregation. The Segregation Review Official is also required to conduct a formal hearing every 30 days assessing the inmate's status. The Segregation Review Official's finding must be approved by the Reviewing Authority.

65. Although Defendants BLEDSOE, BECK, and ORTIZ were assigned to be Segregation Review Officials while Plaintiffs were held within the ADMAX SHU, Defendants BLEDSOE, BECK, and ORTIZ never conducted the individual reviews required by regulation to ensure that placement of Plaintiffs in ADMAX SHU was necessary to vindicate the safety

and security interests of the MDC.

66. During the time that Defendants BLEDSOE, BECK, and ORTIZ worked as Segregation Review Officials, Defendant LOPRESTI was the Reviewing Authority. Defendant LOPRESTI approved BLEDSOE, BECK, and ORTIZ's recommendation to continue holding Plaintiffs in the ADMAX SHU although LOPRESTI was aware that the required review procedures had not been followed.

67. The appropriate review processes were never provided to the post-September 11th detainees, including Plaintiffs. Instead, the detainees were held in the ADMAX SHU until the FBI approved their release to the general population unit.

68. Until the FBI approved the release of a particular detainee, MDC policy was to automatically annotate the detainee status with the phrase "continue high security." The post-September 11th detainees were not afforded any hearings, and they remained under restrictive detention in the ADMAX SHU as a matter of policy until defendant COOKSEY issued a memorandum approving their release to general population.

69. The policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were "cleared" by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.

70. Consistent with this policy. on or about October 1, 2001, defendant COOKSEY directed that all detainees "of high interest" be confined in the most restrictive conditions possible until cleared by the FBI.

71. Defendant SAWYER was aware of and approved of the policies enunciated by Defendant COOKSEY with regard to the confinement of detainees "of high interest" in BOP facilities.

72. Defendants ROLINCE and MAXWELL, after mid-September 2001, were jointly responsible for determining whether a detainee had been "cleared" of any connection to terrorist activity.

73. Officials at FBI Headquarters in Washington, D.C., were aware that the BOP relied on the FBI classification to determine whether to detain prisoners in the ADMAX SHU at the MDC.

74. Nonetheless, Defendants ASHCROFT, MUELLER, and ROLINCE never imposed deadlines for the "clearance" process, and many detainees were held in the ADMAX SHU even after they were approved for release to the general population unit by the FBI.

75. As a result numerous detainees, including Plaintiffs, were held in ADMAX SHU for extended periods of time, although there was no evidence linking them to terrorist activity.

76. Moreover, defendants ROLINCE and MAXWELL failed to approve post-September 11 detainees' release to general population based simply on the detainees' race, religion, and national origin, and not based on any evidence that continued detention in ADMAX SHU was important or relevant to the FBI's investigation of the events of September 11, 2001.

Cruel and Inhumane Conditions of Confinement in the ADMAX SHU

77. Mr. ELMAGHRABY was arrested on or about September 30, 2001 by local and federal law enforce-

ment agents.

78. On or about October 1, 2001, Mr. EL-MAGHRABY was brought to the MDC and housed in the ADMAX SHU.

79. Mr. ELMAGHRABY was housed in the ADMAX SHU the entire time he was detained at the MDC from on or about October 1, 2001 to on or about August 28, 2002.

80. Mr. IQBAL was arrested on or about November 2, 2001 by INS and FBI agents.

81. On or about November 5, 2001 Mr. IQBAL was taken to the MDC and housed in the general population unit on the fifth floor. Mr. IQBAL was housed in the ADMAX SHU from on or about January 8, 2002 until approximately the end of July 2002, at which time he was released back to the general population unit.

82. While detained in the ADMAX SHU, Plaintiffs were kept in solitary confinement, not permitted to leave their cells for more than one hour each day with few exceptions, verbally and physically abused, routinely subjected to humiliating and unnecessary strip and body-cavity searches, denied access to basic medical care, denied access to legal counsel, denied adequate exercise and nutrition, and subjected to cruel and inhumane conditions of confinement.

83. The conditions of Plaintiffs' confinement incited fear and anguish, exacerbated their physical pain and emotional distress, and subjected them to embarrassment and humiliation.

84. Plaintiffs were housed in small cells with the lights on almost 24 hours per day until in or about

March 2002. MDC staff deliberately turned on the air conditioner throughout the winter months, and turned on the heat during the summer months.

85. Plaintiffs were not provided with adequate bedding and personal hygiene items. Until in or about January 2002, Mr. ELMAGHRABY was not given a blanket, pillow, mattress, or any toilet paper. Similarly, Mr. IQBAL was never provided with pillows or more than one blanket.

86. Whenever Plaintiffs were removed from their cells, they were hand cuffed and shackled around their legs and waist.

87. Plaintiffs were subjected to continuous verbal abuse from the MDC staff, demonstrating their animus towards Plaintiffs. Such statements included Mr. IQBAL being called "a terrorist" by Defendant ZENK, "a terrorist and a killer" by Defendant GUSSAK, a "Muslim bastard" by Defendant COTTON, and a "Muslim killer" by Defendant PEREZ. Mr. ELMAGHRABY was called a terrorist" by Defendant SHACKS; when Mr. ELMAGHRABY requested a pair of shoes, Defendant THOMAS responded with a statement, "No shoes for a terrorist"; Defendant COTTON expressed the same animus when he said, "a terrorist should not ask for anything" to Mr. ELMAGHRABY.

88. Plaintiffs were rarely permitted to exercise, and the conditions under which they were permitted to exercise were punitive in effect and intent. For instance, when permitted to exercise in the winter, Plaintiffs were taken to the recreation areas in the ADMAX SHU, which were on the top floor of the MDC in the open-air, in early winter mornings without proper jackets and shoes.

89. On certain days when it rained, MDC officers took Mr. IQBAL to the recreation areas for exercise, and left him in the open-air for hours until he was completely drenched. When Mr. IQBAL was brought back to his cell, the officers deliberately turned on the air conditioner, causing him severe physical discomfort.

90. As the weather became milder, MDC officers permitted Mr. ELMAGHRABY to go to the recreation areas for his exercise. However, the officers permitted him to remain outside for only 15 minutes, in contrast to the cold winter months where the officers left Mr. ELMAGHRABY in the open-air for hours. In the summer months, when it was extremely hot and humid, MDC officers again left Mr. ELMAGHRABY outside for hours.

91. Moreover, Plaintiffs were not provided with adequate food. As a result of the harassment they experienced in the ADMAX SHU, and nutritionally inadequate food, Plaintiffs lost a significant amount of weight. While in custody, Mr. IQBAL lost over 40 pounds, and Mr. ELMAGHRABY lost over 20 pounds. Furthermore, as a result of not having adequate food for a prolonged period of time, Mr. IQBAL currently suffers from persistent digestive problems, causing him to require medical treatment.

92. Such conditions of confinement were punitive in intent and effect.

93. Such conditions of confinement were not related to any legitimate penological interest.

94. Such conditions of confinement were imposed without any individualized determination as to whether they were appropriate for Plaintiffs.

95. Indeed, the MDC's Segregation Review Officials, Defendants BLEDSOE, BECK, and ORTIZ, never conducted a weekly review of Plaintiffs' status regarding whether or not it was appropriate to continue to detain them in the ADMAX SHU. In addition, during the entire time Plaintiffs were housed in the ADMAX SHU, they never received a formal hearing to determine whether such confinement was appropriate. The MDC's Reviewing Authority, Defendant LOPRESTI, nonetheless continued to approve Plaintiffs' confinement in ADMAX SHU.

96. Defendants ASHCROFT, MUELLER, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS each knew of, condoned, and willfully and maliciously agreed to subject Plaintiffs to these conditions of confinement as a matter of policy, solely on account of their religion, race, and/or national origin and for no legitimate penological interest.

97. Defendants ASHCROFT, MUELLER, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, and LOPRESTI willfully and maliciously designed a policy whereby individuals such as Plaintiffs were arbitrarily designated to be confined in the ADMAX SHU without providing any individual determination as to whether such designation was appropriate or should continue.

98. Keeping Plaintiffs in isolation for nearly 24 hours per day, without access to fresh air and light, adequate bedding, adequate heat, and without adequate recreation or exercise, bore no relationship to legitimate security concerns, constituted unjustified punishment, deprived Plaintiffs of their right to liberty, and amounted to the willful, malicious, and unnecessary infliction of pain and suffering.

99. As a result of Defendants' imposition of unlawful conditions of confinement, Plaintiffs suffered permanent physical injury and emotional distress.

Use of Excessive Force on Ehab Elmaghraby

100. Mr. ELMAGHRABY's brutal mistreatment by MDC staff began on the first day he arrived at the facility on or about October 1, 2001, in the early morning hours, when Defendants BLEDSOE, ALAMO, CLARDY, JAIKISSOON, and MOORE willfully and maliciously threw Mr. ELMAGHRABY against a wall of the MDC, subjected him to repeated strip searches, including leaving him naked for approximately 40 minutes, and threatened him with death. Defendants BLEDSOE, ALAMO, CLARDY, JAIKISSOON, and MOORE continually accused Mr. ELMAGHRABY of being a terrorist and being associated with Osama bin Laden, Al Qaeda, and the Taliban. Moreover, when Mr. ELMAGHRABY was transported to court on the same day, Defendants BECK, CHASE, DEFRANCISCO, and DIAZ subjected Mr. ELMAGHRABY to repeated strip searches and willfully and maliciously dragged him on the ground while he was chained and shackled, causing him to bleed from his legs, and.

101. Upon Mr. ELMAGHRABY's return to the MDC, officers brought Mr. ELMAGHRABY up to ADMAX SHU in an elevator. In the elevator, several officers, including Defendants BARRERE, BECK, ORTIZ, MUNDO, and OSTEEN willfully and maliciously physically and verbally assaulted him, causing him to bleed from his nose.

102. Although the officers carried a video camera with them while abusing Mr. ELMAGHRABY, they deliberately turned it off during the entire time the

officers physically and verbally abused Mr. EL-MAGHRABY.

103. The treatment by Defendants BARRERE, BECK, BLEDSOE, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, and OSTEEN on October 1, 2001, caused Mr. ELMAGHRABY to suffer excruciating pain and emotional distress.

104. Mr. ELMAGHRABY was assaulted a second time, on or about December 1, 2001, when he was willfully and maliciously pushed from behind by DOE No. 1 upon Mr. ELMAGHRABY's return from recreation.

105. As a result of being shoved, Mr. EL-MAGHRABY hit his face on a hard surface and broke his teeth, causing him excruciating pain and emotional distress.

106. The beatings of Mr. ELMAGHRABY were motivated by Defendants' animus against Mr. EL-MAGHRABY on account of his race, religion, and/or national origin.

107. There was no legal justification for the assaults and verbal abuse suffered by Mr. EL-MAGHRABY.

108. The beatings of Mr. ELMAGHRABY by MDC staff were all pursuant to the customs and practices of the MDC. Such unlawful customs and practices were known or should have been known to Defendants HASTY, ZENK, THOMAS, SHERMAN, and LOPRESTI, who with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute,

create, or enforce reasonable policies or procedures to curtail such unlawful activity.

109. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS knew of or should have known of the propensity of their subordinates to inflict unnecessary and assaultive beatings upon Mr. ELMAGHRABY, and Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

110. As a result of said willful, malicious, and unlawful conduct by Defendants, Mr. ELMAGHRABY suffered severe and permanent physical injury and extreme emotional distress.

Use of Excessive Force on Javaid Iqbal

111. Consistent with Mr. ELMAGHRABY's experience of physical abuse, Mr. IQBAL was subjected to brutal mistreatment from the very day he was transferred from general population to the ADMAX SHU on or about January 8, 2002, after he was brought back to the MDC from court.

112. On the day he was transferred to the ADMAX SHU, he was told by an officer on the fifth floor that he had a legal visit.

113. Mr. IQBAL was then taken to a room where Defendants DOE Nos. 2-16 were waiting for him. Several of these officers picked him up and threw him against the wall, kicked him in the stomach, punched him in the face, and dragged him across the room. In addition, the officers screamed at him, saying that he

was a "terrorist" and a "Muslim."

114. Mr. IQBAL was then taken to the ADMAX SHU. While he was being moved, he was shackled and chained around his arms, legs, and waist.

115. From this incident, Mr. IQBAL suffered serious physical injuries, including bleeding from his mouth and nose, as well as severe emotional distress.

116. Mr. IQBAL was again assaulted on or about March 20, 2002, when Defendants CUSH, DEFRANCISCO, OSTEEN, and DOE Nos. 17-18 ordered Mr. IQBAL to submit to a strip and body-cavity search.

117. The officers conducted three serial strip and body-cavity searches of Mr. IQBAL in the same room. Although the officers had a handheld video camera, they turned it off while they conducted the searches.

118. Mr. IQBAL peacefully protested when the officers willfully and maliciously ordered him to submit to a fourth search.

119. In response, Defendant DEFRANCISCO punched Mr. IQBAL in the face and Defendant CUSH punched Mr. IQBAL in the back and his legs and kicked him in the back. As a result, Mr. IQBAL bled from his mouth. There was no legal justification for Defendants' brutal assault of Mr. IQBAL.

120. The officers next took Mr. IQBAL to the ADMAX SHU. En route to the ADMAX SHU, the officers continued to kick, physically harass, and verbally harass him by making racist and violent comments about Muslims.

121. When they arrived at the ADMAX SHU, Defendants DEFRANCISCO, CUSH, OSTEEN and DOE Nos. 17-18 willfully and maliciously pulled Mr. IQBAL's arm through the slot in his cell door,

causing him excruciating pain.

122. Defendant DEFRANCISCO willfully and maliciously urinated in the cell in Mr. IQBAL's toilet, and then turned the water off in the cell so that he could not flush the toilet. Mr. IQBAL was not able to flush the toilet until the next morning.

123. The beatings of Mr. IQBAL were motivated by Defendants' animus against Mr. IQBAL on account of his race, religion, and/or national origin.

124. The beatings of Mr. IQBAL by MDC staff were all pursuant to the customs and practices of the MDC. Such unlawful customs and practices were known or should have been known to Defendants HASTY, ZENK, THOMAS, SHERMAN, and LOPRESTI, who with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

125. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS knew of or should have known of the propensity of their subordinates to inflict unnecessary and assaultive beatings upon Mr. IQBAL, and Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

126. As a result of said willful, malicious, and unlawful conduct by Defendants, Mr. IQBAL currently suffers permanent physical and emotional injuries, including but not limited to limited hearing, permanent injury to his right leg, gastrointestinal

problems, and depression.

Strip and Body Cavity Searches of Mr. Elmaghraby

127. Mr. ELMAGHRABY was subjected to numerous unreasonable, unnecessary and extreme strip and body-cavity searches while confined in the ADMAX SHU.

128. During the first three or four months of his detention, Mr. ELMAGHRABY was strip searched every morning. The officers ordered him to take off his clothes and inspected him through the slot in the door before they entered the cell. Defendants BECK, GUSSAK, ORTIZ, BARRERE, DIAZ, MUNDO, OSTEEN, and ROSEBERRY willfully and maliciously subjected Mr. ELMAGHRABY to these strip searches, although they were not related to any legitimate security or penological interest.

129. Along with being strip searched every morning for the first several months of his detention, every time Mr. ELMAGHRABY went to court, and each time he returned to court, he was strip and body-cavity searched three times.

130. Upon leaving for court, the first search occurred in Mr. ELMAGHRABY's cell in the ADMAX SHU, the second search in a different room in the ADMAX SHU, and the final search on the ground floor of MDC. When Mr. ELMAGHRABY returned from court, the searches occurred in reverse order. These searches occurred on or about the following dates: October 1, October 2, November 5, November 8, and December 11, 2001, and January 8, February 12, February 13, and July 22, 2002. During these searches, Mr. ELMAGHRABY was ordered to pass his clothes to a corrections officer and bend over while a corrections officer used a flashlight to search

his body cavities.

131. None of these searches vindicated any legitimate security or penological interest. Indeed, the second and third searches were particularly egregious, because they were conducted even though Mr. ELMAGHRABY was in the custody of MDC employees from the moment he was first searched until after he was searched for the third time.

132. While the strip and body cavity-searches were conducted, Mr. ELMAGHRABY was threatened, mocked and verbally abused. In addition, he was regularly pushed and shoved.

133. Defendants BECK, GUSSAK, ORTIZ, BARRERE, MUNDO, DIAZ, OSTEEN, and ROSEBERRY willfully and maliciously participated in and conducted the strip searches of Mr. ELMAGHRABY.

134. Defendants SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS willfully and maliciously approved of, endorsed, and/or ordered that the searches take place as a matter of policy.

135. On many occasions, Defendants conducted the strip searches in an extreme and outrageous manner. For instance, on one occasion, Defendant BARRERE willfully and maliciously displayed Mr. ELMAGHRABY while naked to a female employee of the MDC. On or about October 1, 2001, while Defendants BECK, ORTIZ, MUNDO, and OSTEEN were present for a body-cavity search of Mr. ELMAGHRABY, Defendant BARRERE willfully and maliciously inserted a flashlight into Mr. ELMAGHRABY's anal cavity. Mr. ELMAGHRABY noticed blood on the flashlight when it was removed from his anal cavity. On or about November 8, 2001, while Defendant DEFRANCISCO

conducted a strip-search of Mr. ELMAGHRABY with other MDC officers, Defendant DEFRANCISCO inserted a pencil into Mr. ELMAGHRABY's anal cavity. Additionally, on or about January 8, 2002, Defendants MUNDO, COTTON, DEFRANCISCO, and OSTEEN conducted a strip search of Mr. ELMAGHRABY in which Defendant COTTON willfully and maliciously pushed a pencil into Mr. ELMAGHRABY's anal cavity.

Strip and Body Cavity Searches of Mr. Javaid Iqbal

136. As with Mr. ELMAGHRABY, Mr. IQBAL was also subjected to numerous unreasonable, unnecessary and extreme strip and body-cavity searches while confined in the ADMAX SHU.

137. Each morning, MDC corrections officers first searched Mr. IQBAL's cell. During this search, Mr. IQBAL was chained and shackled and was routinely kicked and punched by MDC officers.

138. After the cell search, Mr. IQBAL was subjected to a strip and body-cavity search.

139. In addition to the daily strip and body-cavity searches, each time Mr. IQBAL visited the medical clinic for treatment, he was subjected to three strip searches, once before the medical visit and twice after the visit.

140. On days when he appeared in court, Mr. IQBAL was strip searched twice before he even left the building. As usual, Mr. IQBAL was subjected to a strip and cavity-search on or about 5:30 am. Mr. IQBAL was strip searched including a cavity search right before the MDC officers escorted him from his cell to the first floor of the building. The second search occurred on or about 7:40 am. When Mr.

IQBAL returned from court, he also was subjected to two strip searches. These searches occurred on or about the following dates: February 19, 2002, March 6, 2002, March 20, 2002, and April 22, 2002.

141. Defendants BECK, BARRERE, ORTIZ, OSTEEN, PEREZ, ROSEBERRY, and DOE No. 19 willfully and maliciously participated in and conducted these strip searches.

142. Defendants SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS willfully and maliciously approved of, endorsed, and/or ordered that these searches take place as a matter of policy.

143. On many occasions, Defendants conducted the strip searches in an extreme and outrageous manner. For instance, on or about March 20, 2002, Defendants CUSH, DEFRANCISCO, OSTEEN, and DOE Nos. 17-18 ordered Mr. IQBAL to submit to a strip and body-cavity search.

144. The officers conducted three serial strip and body cavity searches of Mr. IQBAL in the same room. Although the officers had a handheld video camera, they turned it off while they conducted the searches.

145. Mr. IQBAL peacefully protested when the officers willfully and maliciously ordered him to submit to a fourth and completely unnecessary search.

146. In response Defendants assaulted Mr. IQBAL, as described in Pars. 116-122.

147. The strip search policy established and implemented by Defendants did not vindicate any legitimate security or penological interest.

148. Defendants SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI,

and SHACKS each knew of, condoned, and willfully and maliciously agreed to subject Plaintiffs to unreasonable, unnecessary and extreme strip and body-cavity searches.

149. The imposition of unreasonable, unnecessary and extreme strip and body-cavity searches were all pursuant to the customs and practices of the MDC. Such unlawful customs and practices were known or should have been known to Defendants SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, and LOPRESTI, who with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

150. Defendants SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS knew of or should have known of the propensity of their subordinates to conduct unreasonable, unnecessary and extreme strip searches, and Defendants SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

151. Plaintiffs were subjected to unreasonable, extreme and unnecessary strip and body-cavity searches because of their race, religion, and/or national origin and for not legitimate penological purpose.

152. As a result of Defendants' actions, Plaintiffs suffered physical injury, extreme emotional distress,

humiliation, and embarrassment.

Interference with Religious Practice

153. During the entire time that Plaintiffs were confined in the ADMAX SHU, their sincere religious practices and beliefs were constantly burdened and met with interference. Such interference included banging on the cells when they were praying, routinely confiscating their Koran, and refusing to permit Plaintiffs to participate in Friday prayer services with fellow Muslims.

154. When Plaintiffs asked for Friday prayer services with fellow Muslims, they were met with comments such as, "No prayers for terrorists" by Defendant THOMAS and "Why do you need to pray when you are in jail? Go to sleep," by Defendant SHACKS.

155. Said interference was an undue burden on Plaintiffs' sincere religious practice and belief.

156. Moreover, the targeting of Plaintiffs for physical and verbal harassment and the imposition of restrictive conditions of confinement constituted an undue burden on Plaintiffs' sincere religious practice and belief.

157. Although Mr. ELMAGHRABY complained to Defendants THOMAS, HASTY, ZENK, SHACKS, COTTON, and BARRERE about the interference with his religious practice, said Defendants willfully and maliciously refused to take any action to remedy the situation.

158. Defendants SHACKS, PEREZ, DEFRANCISCO, TORRES, and COTTON were each aware of the interference with Mr. IQBAL's religious practice, and nonetheless each Defendant agreed to, endorsed,

and willfully and maliciously participated in the routine confiscation of his Koran.

159. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS each knew of, condoned, and willfully and maliciously failed to prevent this interference with Plaintiffs' religious practice.

160. The interference with Plaintiffs' religious practice by MDC staff were all pursuant to the customs and practices of the MDC. Such unlawful customs and practices were known or should have been known to Defendants HASTY, ZENK, THOMAS, SHERMAN, and LOPRESTI, who with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

161. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS knew of or should have known of the propensity of their subordinates to interfere with Plaintiffs' religious practice, and Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

162. Defendants did not similarly interfere with the religious practice of non-Muslims.

163. As a result of Defendants' intentional interference with Plaintiffs' religious practice, each Plaintiff suffered extreme emotional distress.

Interference with Right to Counsel

164. Defendant COTTON was the counselor for the ADMAX SHU and determined whether and when detainees were permitted visitation or phone calls.

165. While in the ADMAX SHU, Plaintiffs' communication with their legal counsel was substantially interfered with by Defendants COTTON and SHACKS.

166. For instance, from on or about October 1, 2001, until in or about the last week of November 2001, Defendant COTTON prohibited Mr. ELMAGHRABY from speaking by telephone with his criminal defense attorney.

167. After in or about November 2001, on those occasions when Mr. ELMAGHRABY was permitted to speak with his criminal attorney, Defendant COTTON stood nearby and disconnected the phone when Mr. ELMAGHRABY complained about any of the conditions of his confinement in the ADMAX SHU.

168. Similarly, on those occasions when Mr. IQBAL was permitted to speak with his criminal attorney, Defendant COTTON stood nearby and disconnected the phone if Mr. IQBAL complained about any of the conditions of his confinement in the ADMAX SHU.

169. When Mr. ELMAGHRABY's attorney tried to visit him at the MDC, she often waited for hours without seeing Mr. ELMAGHRABY.

170. On those occasions when Mr. ELMAGHRABY was able to meet with his attorney at the MDC, a video camera recorded the visit and when he returned to his cell, he would find that it had been ransacked. On these occasions, even though his legal visit was non-contact, Mr. ELMAGHRABY was

forced to submit to a strip search.

171. Mr. IQBAL's attorney was turned away from the MDC several times, being falsely informed that Mr. IQBAL had been transferred to another facility. Additionally, Defendant SHACKS routinely delayed Mr. IQBAL's receipt of legal mail, sometimes by up to two months.

172. As a result, Plaintiffs' communication with counsel was substantially interfered with.

173. Defendants SAWYER, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, COTTON and SHACKS each knew of and condoned the imposition of substantial restrictions on Plaintiffs' right to communicate with counsel.

174. The imposition of these restrictions was all pursuant to the customs and practices of the MDC. Such unlawful customs and practices were known or should have been known to Defendants SAWYER, HASTY, ZENK, THOMAS, SHERMAN, and LOPRESTI, who with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

175. Defendants SAWYER, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS knew of or should have known of the propensity of their subordinates to substantially interfere with Plaintiffs' right to counsel, and Defendants SAWYER, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail

such unlawful activity.

176. Plaintiffs' right to communicate with counsel was interfered with because of their race, religion, and/or national origin.

177. As a result of Defendants' actions, Plaintiffs suffered extreme emotional distress.

Deliberate Indifference to Serious Medical Needs

178. Both Plaintiffs also were denied access to constitutionally adequate medical care.

179. On or about December 1, 2001, Mr. EL-MAGHRABY was pushed from behind by Defendant DOE No. 1, upon Mr. ELMAGHRABY's return from recreation.

180. As a result of being shoved, Mr. EL-MAGHRABY hit his face on a hard object and broke his teeth.

181. Defendant LORENZO provided Mr. EL-MAGHRABY with antibiotics for his injury, but they were confiscated by Defendant ORTIZ when Mr. ELMAGHRABY returned to the ADMAX SHU.

182. Mr. ELMAGHRABY complained to Defendant SHACKS, who asked Mr. ELMAGHRABY why he needed his teeth.

183. As a result of Defendants' mistreatment, Mr. ELMAGHRABY suffered extreme pain and emotional distress.

184. Moreover, while Mr. ELMAGHRABY was confined in the ADMAX SHU, Defendant LORENZO erroneously diagnosed him with asthma and prescribed him with asthma medication.

185. As a result of Defendant LORENZO's misdi-

agnosis, Mr. ELMAGHRABY's actual condition, hypothyroid, became worse and he had to undergo surgery to correct the problem.

186. As a result of this cruel and inhuman treatment, Mr. ELMAGHRABY suffered and continues to suffer severe emotional distress, as well as persistent physical injuries.

187. On or about March 21, 2002, the day after Mr. IQBAL had been beaten by Defendants CUSH and DEFRANCISCO, as described in Pars. 116-122, Mr. IQBAL requested medical assistance from Defendant LORENZO. Defendant SHACKS, however, told Defendant LORENZO to leave the ADMAX SHU without providing any medical assistance, and Defendant COTTON also refused Mr. IQBAL's requests for medical assistance.

188. Mr. IQBAL did not receive any medical care for two weeks after he was brutally assaulted, despite the fact that he was experiencing excruciating pain and suffering.

189. Defendants LORENZO, COTTON, ORTIZ, and SHACKS willfully and maliciously failed and refused to provide adequate medical care to Plaintiffs. Said deficiencies in the provision of adequate medical care include but are not limited to the following: Defendants LORENZO, COTTON, and SHACKS's refusal to provide treatment to Mr. IQBAL until about two weeks after he was assaulted on or about March 20, 2002; Defendant LORENZO's failure to properly diagnose Mr. ELMAGHRABY's hypothyroid condition; and Defendants ORTIZ and SHACKS's confiscation of the antibiotics prescribed by Defendant LORENZO as a result of the brutal assault of Mr. ELMAGHRABY on or about December 1, 2001.

190. Defendants LORENZO, COTTON, ORTIZ, and SHACKS, acting under color of federal law, by their actions and/or omissions, willfully and maliciously demonstrated deliberate indifference to Plaintiffs' life and safety and/or serious medical needs.

191. Defendants LORENZO, COTTON, ORTIZ, and SHACKS, acting under color of federal law, by their actions and/or omissions, willfully and maliciously denied Plaintiffs' life, liberty, and/or property without due process of law.

192. Defendants LORENZO, COTTON, ORTIZ, and SHACKS each knew or should have known of the deficiencies alleged herein which were within his/her jurisdiction.

193. Defendants LORENZO, COTTON, ORTIZ, and SHACKS each knew or should have known that there was a foreseeable risk of serious harm as a result of the deficiencies alleged herein.

General Allegations

194. Defendants BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19 each knew of, participated in, and willfully and maliciously subjected Plaintiffs to the mistreatment described here-in.

195. Defendants ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO,

DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19 were aware of, approved of, and willfully and maliciously created these unlawful conditions of confinement.

196. The repeated beatings and mistreatment of Plaintiffs were pursuant to the policy and practice of the MDC. Such unlawful customs and practices were known or should have been known to Defendants HASTY, ZENK, THOMAS, SHERMAN, and LOPRESTI, who with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

197. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS knew of or should have known of the propensity of their subordinates to subject Plaintiffs to the beatings and other mistreatment described herein, and Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

198. Defendants specifically targeted Plaintiffs for mistreatment because of Plaintiffs' race, religion, and/or national origin.

199. Defendants' conduct imposed an undue burden on Plaintiffs' sincere religious belief and practice.

200. As a result of Defendants' malicious, willful, and unlawful conduct, Plaintiffs suffered severe and permanent physical injuries and severe emotional

distress.

FIRST CAUSE OF ACTION
(Conditions of Confinement—
Fifth Amendment Due Process)

201. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 200.

202. By willfully and maliciously subjecting Plaintiffs to outrageous, excessive, cruel, inhuman and degrading conditions of confinement, including the denial of adequate nutrition, the denial of adequate exercise, the imposition of unnecessary and unlawful strip and body-cavity searches, extended detention in solitary confinement, and subjection to unprovoked and unjustified physical and emotional abuse, Defendants BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19, acting under color of law and their authority as federal officers, have deprived Plaintiffs of liberty and/or property without due process of law in violation of the Fifth Amendment to the United States Constitution. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, by failing to take reasonable measures to prevent and/or to remedy Plaintiffs' mistreatment, have deprived Plaintiffs of liberty and/or property without due process of law in violation of the Fifth Amendment to the

United States Constitution.

203. As a result of Defendants' unlawful conduct, Plaintiffs have suffered severe pain and suffering, including physical injuries, emotional distress, humiliation, and embarrassment, and accordingly each Plaintiff is entitled to compensatory damages against HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

SECOND CAUSE OF ACTION
(Assignment to ADMAX SHU—
Fifth Amendment Due Process)

204. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 203.

205. By willfully and maliciously adopting, promulgating and implementing the policy and practice under which Plaintiffs were confined to solitary confinement in the ADMAX SHU in an arbitrary and unreasonable manner, without any defined criteria, contemporaneous review, or process of any sort, and by which classifications Plaintiffs experienced unnecessary and unreasonable restrictions on their liberty that were atypical and significant departures from the restrictions imposed upon detainees in general population, Defendants ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN,

LOPRESTI, BECK, BLEDSOE, ORTIZ, and SHACKS, acting under color of law and their authority as federal officers, have intentionally or recklessly deprived Plaintiffs of liberty without due process of law in violation of the Fifth Amendment to the United States Constitution.

206. As a result of Defendants' unlawful conduct, Plaintiffs suffered emotional distress humiliation, and embarrassment, and accordingly each Plaintiff is entitled to compensatory damages against ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BECK, BLEDSOE, ORTIZ, and SHACKS, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

THIRD CAUSE OF ACTION

(Excessive Force—Fifth Amendment Due Process)

207. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 206.

208. The unprovoked, unjustified, willful, and malicious intentional beatings of Plaintiffs by Defendants BARRERE, BECK, BLEDSOE, CUSH, GUSSAK, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, PEREZ, OSTEEN, and DOE Nos. 1-18 deprived Plaintiffs of their right to liberty and property in violation of the Fifth Amendment to the United State Constitution. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, by failing to take reasonable measures to prevent and/or to remedy their subordinates' abuse of Plaintiffs, deprived

Plaintiffs of their right to liberty and property in violation of the Fifth Amendment to the United States Constitution.

209. As a proximate result of the excessive force wielded against them, Plaintiffs sustained permanent injuries and incurred medical bills and other expenses. These injuries have caused and will continue to cause Plaintiffs great pain and suffering, both mental and physical, and accordingly each Plaintiff is entitled to compensatory damages against HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS, BARRERE, BECK, BLEDSOE, CUSH, GUSSAK, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, PEREZ, OSTEEN, and DOE Nos. 1-18, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

FOURTH CAUSE OF ACTION
(Excessive Force—Eighth Amendment Cruel and Unusual Punishment)

210. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 209.

211. The unprovoked, unjustified, willful, and malicious intentional beatings of Plaintiffs by Defendants BARRERE, BECK, BLEDSOE, CUSH, GUSSAK, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, PEREZ, OSTEEN, and DOE Nos. 1-18 constituted cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, by failing to

take reasonable measures to prevent and/or to remedy their subordinates' abuse of Plaintiffs, violated the Eighth Amendment's prohibition against cruel and unusual punishment.

212. As a proximate result of the excessive force wielded against them, Plaintiffs sustained permanent injuries and incurred medical bills and other expenses. These injuries have caused and will continue to cause Plaintiffs great pain and suffering, both mental and physical, and accordingly each Plaintiff is entitled to compensatory damages against HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS, BARRERE, BECK, BLEDSOE, CUSH, GUSSAK, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, PEREZ, OSTEEN, and DOE Nos. 1-18, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

FIFTH CAUSE OF ACTION
(Interference with Right to Counsel—
Sixth Amendment)

213. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 212.

214. By willfully and maliciously adopting, promulgating, failing to prevent, failing to remedy, and/or implementing the policy and practice under which Plaintiffs' access to counsel was substantially interfered with, Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS, and COTTON violated Plaintiffs' right to counsel guaranteed by the Sixth Amendment of the United States Constitution.

215. As a result of Defendants' unlawful conduct,

Plaintiffs have suffered emotional distress, humiliation, and embarrassment, and accordingly each Plaintiff is entitled to compensatory damages against HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS, and COTTON jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

SIXTH CAUSE OF ACTION
(Denial of Medical Treatment—
Fifth Amendment Due Process)

216. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 215.

217. By denying Plaintiffs their right to adequate medical examination and care, Defendants LORENZO, COTTON, ORTIZ, and SHACKS deprived Plaintiffs of their liberty and property without due process of law in violation of the Fifth Amendment to the United States Constitution.

218. As a result of Defendants' unlawful conduct, Plaintiffs sustained permanent injuries and incurred medical bills and other expenses. These injuries have caused and will continue to cause Plaintiffs great emotional distress and physical pain and suffering, and accordingly each Plaintiff is entitled to compensatory damages against LORENZO, COTTON, ORTIZ, and SHACKS jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

SEVENTH CAUSE OF ACTION
(Denial of Medical Treatment—
Eighth Amendment Cruel and Unusual Punishment)

219. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 218.

220. By denying Plaintiffs their right to adequate medical examination and care, Defendants LORENZO, COTTON, ORTIZ, and SHACKS exhibited deliberate indifference to Plaintiffs' serious medical needs in violation of the Eighth Amendment to the United States Constitution.

221. As a result of Defendants' unlawful conduct, Plaintiffs sustained permanent injuries and incurred medical bills and other expenses. These injuries have caused and will continue to cause Plaintiffs great emotional distress and physical pain and suffering, and accordingly each Plaintiff is entitled to compensatory damages against LORENZO, COTTON, ORTIZ, and SHACKS jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

EIGHTH CAUSE OF ACTION
(Conditions of Confinement—
Eighth Amendment Due Process)

222. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 221.

223. By willfully and maliciously subjecting Plaintiffs to outrageous, excessive, cruel, inhuman and degrading conditions of confinement, including the denial of adequate nutrition, the denial of adequate exercise, the imposition of unnecessary and unlawful strip and body-cavity searches, extended detention in solitary confinement, and subjection to unprovoked and unjustified physical and emotional abuse, Defen-

dants BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, and DOE Nos. 1-19, acting under color of law and their authority as federal officers, subjected Plaintiffs to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, by failing to take reasonable measures to prevent and/or to remedy Plaintiffs' mistreatment, subjected Plaintiffs to cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

224. As a result of Defendants' unlawful conduct, Plaintiffs have suffered severe pain and suffering, including physical injuries, emotional distress, humiliation, and embarrassment, and accordingly each Plaintiff is entitled to compensatory damages against HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

NINTH CAUSE OF ACTION
(Unreasonable Strip and Body Cavity-Searches—
Fourth Amendment)

225. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 224.

226. By willfully and maliciously adopting, promulgating, failing to prevent, failing to remedy, and/or implementing the policy and practice under which Plaintiffs were repeatedly subjected to unreasonable and unjustified strip and body-cavity searches, Defendants SAWYER, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS, BARRERE, BECK, CUSH, GUSSAK, ORTIZ, BARRERE, COTTON, DEFRANCISCO, DIAZ, MUNDO, OSTEEN, PEREZ, ROSEBERRY, and DOE Nos. 17-19 subjected Plaintiffs to unreasonable searches and seizures in violation of the Fourth Amendment to the United States Constitution.

227. As a result of Defendants SAWYER, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS, BARRERE, BECK, CUSH, GUSSAK, ORTIZ, BARRERE, COTTON, DEFRANCISCO, DIAZ, MUNDO, OSTEEN, PEREZ, ROSEBERRY, and DOE Nos. 17-19's unlawful conduct, Plaintiffs suffered physical injuries, emotional distress, humiliation, and embarrassment. Plaintiffs are therefore entitled to compensatory damages against SAWYER, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS, BARRERE, BECK, CUSH, GUSSAK, ORTIZ, BARRERE, COTTON, DEFRANCISCO, DIAZ, MUNDO, OSTEEN, PEREZ, ROSEBERRY, and DOE Nos. 17-19 jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

TENTH CAUSE OF ACTION
(Interference With Religious Practice—
First Amendment)

228. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs

numbered 1 through 227.

229. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, TORRES, COTTON, DEFRANCISCO, PEREZ, and SHACKS, by adopting, promulgating, failing to prevent, failing to remedy, and/or implementing a policy and practice of interfering with Plaintiffs' religious practices, violated Plaintiffs' rights under the First Amendment to the United States Constitution.

230. As a result, Plaintiffs suffered extreme emotional distress and accordingly are entitled to compensatory damages against HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, TORRES, COTTON, DEFRANCISCO, PEREZ, and SHACKS, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

ELEVENTH CAUSE OF ACTION
(Discrimination Against Muslims—
First Amendment)

231. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 230.

232. Defendants ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, TORRES, COTTON, DEFRANCISCO, PEREZ, and SHACKS, by adopting, promulgating, failing to prevent, failing to remedy, and/or implementing a policy and practice of imposing harsher conditions of confinement on Plaintiffs because of Plaintiffs' sincere religious beliefs violated Plaintiffs' rights under the First Amendment to the United

States Constitution.

233. As a result, Plaintiffs suffered extreme physical injuries and emotional distress, including permanent injuries, and accordingly are entitled to compensatory damages against ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, TORRES, COTTON, DEFRANCISCO, PEREZ, and SHACKS, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

TWELFTH CAUSE OF ACTION
(Race Discrimination—
Fifth Amendment Equal Protection)

234. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 233.

235. Defendants ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19, by adopting, promulgating, failing to prevent, failing to remedy, and/or implementing a policy and practice of imposing harsher conditions of confinement on Plaintiffs because of Plaintiffs' race violated Plaintiffs' rights under the Fifth Amendment to the United States Constitution.

236. As a result, Plaintiffs suffered extreme physical injuries and emotional distress, including perma-

nent injuries, and accordingly are entitled to compensatory damages against ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

THIRTEENTH CAUSE OF ACTION
(Conditions of Confinement—RFRA)

237. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 236.

238. Defendants ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19, by adopting, promulgating, failing to prevent, failing to remedy, and/or implementing a policy and practice of imposing harsher conditions of confinement on Plaintiffs because of Plaintiffs' sincere religious beliefs, substantially burdened Plaintiffs' religious exercise and belief, without any legitimate justification, in violation of 42 U.S.C. §§ 2000bb-1.

239. As a result, Plaintiffs suffered extreme physi-

cal injuries and emotional distress, including permanent injuries, and accordingly are entitled to compensatory damages against ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19, jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

FOURTEENTH CAUSE OF ACTION
(Interference With Religious Practice—RFRA)

240. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 239.

241. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, TORRES, COTTON, DEFRANCISCO, PEREZ, and SHACKS, by adopting, promulgating, failing to prevent, failing to remedy, and/or implementing a policy and practice of confiscating Plaintiffs' religious materials, regularly interrupting Plaintiffs' daily prayers, and denying Plaintiffs access to Friday prayers, substantially burdened Plaintiffs' religious exercise and belief, without any legitimate justification, in violation of 42 U.S.C. §§ 2000bb-1.

242. As a result, Plaintiffs suffered extreme emotional distress, including permanent injuries, and accordingly are entitled to compensatory damages against HASTY, ZENK, THOMAS, SHERMAN,

LOPRESTI, BARRERE, TORRES, COTTON, DEFRANCISCO, PEREZ, SHACKS, and COTTON jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

FIFTEENTH CAUSE OF ACTION
(Excessive Force—RFRA)

243. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 242.

244. Defendants BARRERE, BECK, BLEDSOE, CUSH, GUSSAK, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, PEREZ, OSTEEN, and DOE Nos. 1-18, by brutally beating and verbally abusing Plaintiffs because of Plaintiffs' sincere religious beliefs, imposed a substantial burden on Plaintiffs' religious exercise and belief, without any legitimate justification, in violation of 42 U.S.C. §§ 2000bb-1. Defendants, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, by failing to take reasonable measures to prevent and/or to remedy their subordinates' abuse of Plaintiffs, acted in violation of 42 U.S.C. §§ 2000bb-1.

245. As a result, Plaintiffs suffered extreme physical injuries and emotional distress, including permanent injuries, and accordingly are entitled to compensatory damages against HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUSH, GUSSAK, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, PEREZ, OSTEEN, SHACKS, and DOE Nos. 1-18, jointly and severally in an amount to be determined at trial and punitive

damages against each Defendant in an amount to be determined at trial.

SIXTEENTH CAUSE OF ACTION
(Religious Discrimination—42 U.S.C. § 1985(3))

246. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 245.

247. Defendants, by engaging in the following conduct, agreed to deprive Plaintiffs of the equal protection of the laws and of equal privileges and immunities of the laws of the United States because of Plaintiffs' sincere religious belief, resulting in injury to Plaintiffs' person and property, in violation of 42 U.S.C. § 1985(3): Defendants ASHCROFT, MUELLER, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS's agreement to subject Plaintiffs to unnecessarily harsh conditions of confinement in ADMAX SHU without due process of law; Defendants BARRERE, BECK, BLEDSOE, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, and OSTEEN's agreement to brutally mistreat Mr. ELMAGHRABY on or about October 1, 2001; Defendants DOE Nos. 2-16's agreement to brutally assault Mr. IQBAL on or about January 8, 2002; Defendants CUSH, DEFRANCISCO, OSTEEN, and DOE Nos. 17-18's agreement to subject Mr. IQBAL to unnecessary strip and body-cavity searches on or about March 20, 2002, and brutally beat him in response to his peaceful protest of the searches; Defendants BECK, ORTIZ, BARRERE, MUNDO, and OSTEEN's agreement on or about October 1, 2001 to conduct an extreme and

cruel body-cavity search of Mr. ELMAGHRABY during which Defendant BARRERE willfully and maliciously inserted a flashlight into Mr. ELMAGHRABY's anal cavity; Defendants MUNDO, COTTON, DEFRANCISCO, and OSTEEN's agreement on or about January 8, 2002 to conduct an extreme and cruel strip search of Mr. ELMAGHRABY in which Defendant COTTON willfully and maliciously pushed a pencil into Mr. ELMAGHRABY's anal cavity; Defendants SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS's agreement to subject

Plaintiffs to unnecessary and extreme strip and body-cavity searches as a matter of policy; Defendants SHACKS, PEREZ, DEFRANCISCO, TORRES, and COTTON's agreement to routinely confiscate Mr. IQBAL's Koran; and Defendants THOMAS, HASTY, ZENK, SHACKS, COTTON, and BARRERE's agreement to substantially burden Mr. ELMAGHRABY's religious practice while he was housed in ADMAX SHU.

248. As a result, Plaintiffs suffered extreme physical injuries and emotional distress, including permanent injuries, and accordingly are entitled to compensatory damages against ASHCROFT, MUELLER, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, PEREZ, SHACKS, and DOE Nos. 2-18 jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

SEVENTEENTH CAUSE OF ACTION
(Race and National Origin Discrimination—
42 U.S.C. § 1985(3))

249. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 248.

250. Defendants, by engaging in the following conduct, agreed to deprive Plaintiffs of the equal protection of the laws and of equal privileges and immunities of the laws of the United States because of Plaintiffs' race and/or national origin, resulting in injury to Plaintiffs' person and property, in violation of 42 U.S.C. § 1985(3): Defendants ASHCROFT, MUELLER, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS's agreement to subject Plaintiffs to unnecessarily harsh conditions of confinement in ADMAX SHU without due process of law; Defendants BARRERE, BECK, BLEDSOE, ORTIZ, MUNDO, ALAMO, CHASE, CLARDY, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, and OSTEEN's agreement to brutally mistreat Mr. ELMAGHRABY on or about October 1, 2001; Defendants DOE Nos. 2-16's agreement to brutally assault Mr. IQBAL on or about January 8, 2002; Defendants CUSH, DEFRANCISCO, OSTEEN, and DOE Nos. 17-18's agreement to subject Mr. IQBAL to unnecessary strip and body-cavity searches on or about March 20, 2002, and brutally beat him in response to his peaceful protest of the searches; Defendants BECK, ORTIZ, BARRERE, MUNDO, and OSTEEN's agreement on

or about October 1, 2001 to conduct an extreme and cruel body-cavity search of Mr. ELMAGHRABY during which Defendant BARRERE willfully and maliciously inserted a flashlight into Mr. ELMAGHRABY's anal cavity; Defendants MUNDO, COTTON, DEFRANCISCO, and OSTEEN's agreement on or about January 8, 2002 to conduct an extreme and cruel strip search of Mr. ELMAGHRABY in which Defendant COTTON willfully and maliciously pushed a pencil into Mr. ELMAGHRABY's anal cavity; Defendants SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS's agreement to subject Plaintiffs to unnecessary and extreme strip and body-cavity searches as a matter of policy; Defendants SHACKS, PEREZ, DEFRANCISCO, TORRES, and COTTON's agreement to routinely confiscate Mr. IQBAL's Koran; and Defendants THOMAS, HASTY, ZENK, SHACKS, COTTON, and BARRERE's agreement to substantially burden Mr. ELMAGHRABY's religious practice while he was housed in ADMAX SHU.

251. As a result, Plaintiffs suffered extreme physical injuries and emotional distress, including permanent injuries, and accordingly are entitled to compensatory damages against ASHCROFT, MUELLER, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES, ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, PEREZ, SHACKS, and DOE Nos. 2-18 jointly and severally in an amount to be determined at trial and punitive damages against each Defendant in an amount to be determined at trial.

EIGHTEENTH CAUSE OF ACTION
(Assault and Battery- FTCA)

252. Plaintiff IQBAL repeats and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 251.

253. Defendants BARRERE, BECK, CUSH, GUSSAK, ORTIZ, DEFRANCISCO, OSTEEN, PEREZ, ROSEBERRY, and DOE Nos. 1-18, by kicking, punching, and beating Plaintiff IQBAL without consent, intentionally caused offensive and harmful contact with Plaintiff IQBAL, so as to constitute battery under the laws of New York State, where the relevant acts took place. The batteries committed upon Plaintiff IQBAL were not related to any penological interest. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, and SHACKS, by negligently failing to take reasonable measures to prevent and/or remedy their subordinates' abuse of Plaintiff IQBAL, violated the laws of New York State.

254. In committing the unprovoked and unjustified batteries upon Plaintiff IQBAL in a willful and malicious manner, Defendants BARRERE, BECK, CUSH, GUSSAK, ORTIZ, DEFRANCISCO, OSTEEN, PEREZ, ROSEBERRY, and DOE Nos. 1-18 placed Plaintiff IQBAL in imminent apprehension of offensive and harmful contact, so as to constitute assault under the laws of New York State.

255. Defendants ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS, BARRERE, BECK, CUSH, GUSSAK, DEFRANCISCO, OSTEEN, PEREZ, ROSEBERRY, and DOE Nos. 1-18 were acting within the scope of their employment by the United States when Plaintiff IQBAL was subjected to the batteries and were working as law enforcement officers as

defined by 28 U.S.C. §2680(h).

256. Pursuant to 28 U.S.C. §2675(a), the claims set forth herein were timely presented to the Bureau of Prisons on November 3, 2003 and the said claims were denied on April 27, 2004.

257. As a proximate result of the assault and batteries committed against him, Plaintiff IQBAL sustained permanent injuries and incurred medical bills and other expenses. These injuries have caused and will continue to cause Plaintiff IQBAL great pain and suffering, both mental and physical, and accordingly he is entitled to compensatory damages against the UNITED STATES OF AMERICA in an amount to be determined at trial.

NINTEENTH CAUSE OF ACTION
(Negligent Denial of Medical Treatment- FTCA)

258. Plaintiff IQBAL repeats and realleges as if fully set forth herein the allegations contained in paragraphs numbered 1 through 257.

259. By refusing to provide Plaintiff IQBAL with adequate medical examination and care, Defendants LORENZO, COTTON, SHACKS, acting under color of federal law and their authority as federal officers, have breached their duty under 18 U.S.C. § 4042(a)(2) to take ordinary diligence or reasonable care to keep Plaintiff IQBAL safe and free from harm, so as to constitute negligence under the laws of New York State, where the relevant actions took place.

260. Pursuant to 28 U.S.C. § 2875 (a), the claims set forth herein were timely presented to the Bureau of Prisons on November 3, 2003 and the said claims were denied on April 27, 2004.

261. As a result of Defendants' unlawful conduct,

Plaintiff IQBAL sustained permanent injuries and incurred medical bills and other expenses. These injuries have caused and will continue to cause Plaintiff IQBAL great emotional distress and physical pain and suffering, and accordingly Plaintiff is entitled to compensatory damages against the UNITED STATES OF AMERICA in an amount to be determined at trial.

TWENTIETH CAUSE OF ACTION
(Intentional Infliction of Emotional Distress - FTCA)

262. Plaintiff IQBAL repeats and realleges as if fully set forth herein the allegations contained in paragraphs numbered 1 through 261.

263. Defendants BARRERE, BECK, CUSH, GUSSAK, ORTIZ, DEFRANCISCO, OSTEEN, PEREZ, ROSEBERRY, and DOE Nos. 1-18, acting under color of law and their authority as federal officers, maliciously subjected Plaintiff IQBAL to outrageous conduct of repeated instances of assault and batteries, extreme strip and body cavity-searches, the denial of medical treatment and adequate nutrition, extended detention in solitary confinement, deliberate interference with their rights to counsel and to exercise of their religious beliefs and practices with the intent to causing and reckless disregard of a substantial probability of causing several emotional distress and physical pain and suffering. Defendants HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, SHACKS, by negligently failing to take reasonable measures to prevent and/or to remedy their subordinates' abuse of Plaintiff IQBAL violated the laws of New York State.

264. Pursuant to 28 U.S.C. § 2875 (a), the claims set forth herein were timely presented to the Bureau of Prisons on November 3, 2003 and the said claims

were denied on April 27, 2004.

265. As a result, Plaintiff IQBAL suffered extreme and lasting emotional distress, humiliation, embarrassment, and permanent physical injuries, and accordingly is entitled to compensatory damages

against the UNITED STATES OF AMERICA in an amount to be determined at trial.

TWENTY-FIRST CAUSE OF ACTION
(Cruel, Inhuman, or Degrading Treatment—
Customary International Law:)

266. Plaintiffs repeat and reallege as if fully set forth herein the allegations contained in paragraphs numbered 1 through 265.

267. The acts described herein had the intent and the effect of grossly humiliating Plaintiffs, forcing them to act against their will and conscience, inciting fear and anguish, and breaking their physical and moral resistance.

268. The acts described herein constituted cruel, inhuman or degrading treatment in violation of the law of the nations under the Alien Tort Claims Act, 28 U.S.C. §1350, in that the acts violated customary international law prohibiting cruel, inhuman or degrading treatment as reflected, expressed, and defined in multilateral treaties and other international treatments, international and domestic judicial decisions.

269. Defendants ASHCROFT, MUELLER, ROLINCE, MAXWELL, SAWYER, RARDIN, COOKSEY, HASTY, ZENK, THOMAS, SHERMAN, LOPRESTI, BARRERE, BECK, BLEDSOE, CUCITI, CUSH, GUSSAK, MUNDO, ORTIZ, TORRES,

ALAMO, CHASE, CLARDY, COTTON, DEFRANCISCO, DIAZ, JAIKISSON, MOORE, OSTEEN, PEREZ, ROSEBERRY, SHACKS, LORENZO, and DOE Nos. 1-19 are liable for said conduct in that Defendants, acting under the color of law and their authority as federal officers, directed, ordered, con

firmed, ratified and/or conspired to cause cruel, inhuman or degrading treatment of Plaintiffs.

270. Plaintiffs were forced to suffer severe physical and psychological abuse and emotional distress and are entitled to monetary damages.

JURY DEMAND

Plaintiffs demand a trial by jury. Plaintiff IQBAL does not demand trial by jury for his claims arising under the FTCA.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs respectfully request that a judgment be granted as follows:

a. Awarding compensatory and punitive damages to Plaintiffs for Defendants' violations of constitutional law, federal statutory law, customary international Jaw, and local law, which caused Plaintiffs to suffer physical and emotional harm, in an amount that is fair, just, reasonable and in conformity with the evidence;

b. Awarding Plaintiffs attorney's fees and costs pursuant to 42 U.S.C. § 1988 and N.Y.C. Code § 8-502; and,

c. Such other relief as this Court deems just and proper.

Dated: New York, New York
September 30, 2004

THE URBAN JUSTICE CENTER
and KOOB & MAGOOLAGHAN

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APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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04 CV 1409 (JG)(SMG)

EHAB ELMAGHRABY and JAVAID IQBAL,
Plaintiffs,

v.

JOHN ASHCROFT, Attorney General of the United States, ROBERT MUELLER, Director of the Federal Bureau of Investigation, MICHAEL ROLINCE, former Chief of the Federal Bureau of Investigation's International Terrorism Operations Section, Counterterrorism Division; KENNETH MAXWELL, former Assistant Special Agent in Charge, New York Field Office, Federal Bureau of Investigations; KATHLEEN HAWK SAWYER, former Director of the Federal Bureau of Prisons; DAVID RARDIN, former Director of the Northeast Region of the Bureau of Prisons; MICHAEL COOKSEY, former Assistant Director for Correctional Programs of the Bureau of Prisons; DENNIS HASTY, former Warden of the Metropolitan Detention Center, MICHAEL ZENK, Warden of the Metropolitan Detention Center; LINDA THOMAS, former Associate Warden of Programs of the Metropolitan Detention Center; ASSOCIATE WARDEN SHERMAN, Associate Warden of Custody for the Metropolitan Detention Center; CAPTAIN SALVATORE LOPRESTI; LIEUTENANT STEVEN BARRERE; LIEUTENANT WILLIAM BECK; LIEUTENANT LINDSEY BLEDSOE; LIEUTENANT JOSEPH CUCITI; LIEUTENANT THO-

MAS CUSH; LIEUTENANT HOWARD GUSSAK; LIEUTENANT MARCIAL MUNDO; LIEUTENANT DANIEL ORTIZ; LIEUTENANT ELIZABETH TORRES; CORRECTIONS OFFICER REYNALDO ALAMO; CORRECTIONS OFFICER SIDNEY CHASE CORRECTIONS OFFICER JAMES CLARDY; CORRECTIONS OFFICER RAYMOND COTTON; CORRECTIONS OFFICER MICHAEL DEFRANCISCO; CORRECTIONS OFFICER RICHARD DIAZ; CORRECTIONS OFFICER JAI JAIKISSON; CORRECTIONS OFFICER DEXTER MOORE; CORRECTIONS OFFICER JON OSTEEN; CORRECTIONS OFFICER ANGEL PEREZ; CORRECTIONS OFFICER SCOTT ROSEBERRY; UNIT MANAGER CLEMMETT SHACKS; NORA LORENZO, Physician's Assistant; "JOHN DOE" CORRECTIONS OFFICERS NOS. 1-19, "John Doe" being fictional first and last names, and the UNITED STATES OF AMERICA,

Defendants.

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JOHN GLEESON, United States District Judge:

Plaintiffs Ehab Elmaghraby and Javaid Iqbal are Muslim men from Egypt and Pakistan, respectively, who were arrested on criminal charges in the months following September 11, 2001, and detained at the Metropolitan Detention Center ("MDC") in Brooklyn, New York.[1] Plaintiffs allege that they and other Muslim men were arbitrarily classified as persons "of high interest" to the government's terrorism investigation following the September 11 attacks, and accordingly were housed in the Administrative Maximum Special Housing Unit (the "ADMAX SHU") of the MDC instead of in a general population unit of the facility. Neither plaintiff was afforded the opportunity to contest his classification or continued confinement in the ADMAX SHU. Elmaghraby remained confined there for the entire time he was detained in the MDC – from October 1, 2001 until August 28, 2002. Iqbal remained in the ADMAX SHU from January 8, 2002, when he was transferred there from the general population, until the end of July 2002, when he was returned to the general population.

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[1] Elmaghraby was arrested on September 30, 2001. Charged with violating 18 U.S.C. § 1029 (producing/trafficking in a counterfeit device), Elmaghraby pleaded guilty on February 13, 2002, and was sentenced to a 24-month term of imprisonment on July 22, 2002. A criminal complaint was filed against Iqbal on November 5, 2001, charging him with violations of 18 U.S.C. §§ 371 & 1028 (conspiracy to defraud the United States and fraud with identification). He pleaded guilty on April 22, 2002, and was sentenced to a 16-month term of imprisonment on September 17, 2002. See Docket Reports for *United States v. Elmaghraby*, Docket No. 01-cr-1175 (ILG); *United States v Iqbal*, Docket No. 01-cr-1318 (ILG).

Plaintiffs allege that during their confinement in the ADMAX SHU, they were subjected to, among other things, severe physical and verbal abuse; unnecessary and abusive strip and body-cavity searches; extended detention in solitary confinement; deliberate interference with the exercise of their religious beliefs; and deliberate interference with their attempts to communicate with counsel. In addition, plaintiffs allege that they were denied adequate exercise, nutrition, and medical treatment. As a result of their treatment while in detention, plaintiffs allege that they suffered severe physical injuries, emotional distress and humiliation.

Plaintiffs further allege that they were subjected to these harsh conditions because of their race, national origin, and religion, and that their continued detention under these conditions stemmed from a discriminatory policy created by high-level officials in the executive branch of the federal government.

Plaintiffs allege violations of their constitutional rights under the First, Fourth, Fifth, Sixth, and Eighth Amendments and seek damages pursuant to principles set forth in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Plaintiffs also assert claims under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350; the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb; the civil rights conspiracy statute, 42 U.S.C. § 1985(3); and the Federal Tort Claims ("FTCA"), 28 U.S.C. § 2671 *et seq*.

In addition to bringing claims against the MDC officers with whom they had direct contact, plaintiffs name as defendants former Attorney General John

Ashcroft; Robert Mueller, the Director of the Federal Bureau of Investigation ("FBI"); Michael Rolince, the former Chief of the Counterterrorism Division of the FBI's International Terrorism Operations Section; Kenneth Maxwell, the former Assistant Special Agent in Charge of the FBI's New York Field Office; Kathleen Hawk Sawyer, the former Director of the Bureau of Prisons ("BOP"); Michael Cooksey, the former Assistant Director for Correctional Programs of the BOP; and David Rardin, the former Director of the Northeast Region of the BOP. These defendants have moved to dismiss all the claims against them, as have Dennis Hasty and Michael Zenk (the former and current Wardens of the MDC, respectively), and Nora Lorenzo (a physician's assistant at the MDC).[2] The United States has also moved pursuant to the Liability Reform Act, 28 U.S.C. § 2679, to be substituted as the sole defendant on the claims brought under the Alien Tort Statute and for dismissal of those claims.

For the following reasons, the motions to dismiss are granted in part and denied in part.

BACKGROUND

A. Overview

For the purposes of this motion, I assume, as I must, that plaintiffs' allegations are true.[3] On September

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[2] For ease of discussion, I refer to the individual defendants who have moved to dismiss as, collectively, "defendants." In addition, I refer to certain sub-groups of defendants as follows: Mueller, Rolince, and Maxwell as "the FBI Defendants"; Hawk Sawyer, Cooksey, and Rardin as "the BOP Defendants"; Hasty and Zenk as "the Wardens," and MDC officials other than the Wardens as "MDC Defendants."

[3] On a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a court must assume as true all factual allegations made in the

11, 2001, the al Qaeda terrorist network used hijacked commercial airliners to attack prominent targets in the United States, including the World Trade Center. *See Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2635 (2004). Approximately 3,000 people were killed in those attacks. *Id.* In the months following September 11, the FBI arrested and detained thousands of Arab Muslim men (designated herein as "post-September 11 detainees") as part of its investigation into the attacks.[4]

Plaintiffs allege that FBI officials Rolince and Maxwell classified them, along with many post-September 11 detainees, as persons "of high interest" to the government's terrorism investigation. Plaintiffs assert that they were classified as such based solely on their race, religion, and national origin, and not on any evidence of their involvement in supporting terrorist activities. Indeed, plaintiffs allege that within the New York area, "all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th

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complaint. *See Bolt Elec., Inc. v. City of New York*, 53 F.3d 465, 469 (2d Cir. 1995).

[4] While motions to dismiss are evaluated based on facts alleged in the complaint, this does not mean that the complaint must be viewed in a factual vacuum. Following the attacks on September 11, 2001, the FBI immediately initiated a massive investigation into the attacks. See United States Department of Justice, Office of Inspector General, *The September 11 Detainees. A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks 1* (April 2003) (the "April 2003 OIG Report"). Within 3 days, more than 4,000 FBI Special Agents and 3,000 support personnel were assigned to work on the investigation. *Id.* at 11-12. By September 18, 2001, the FBI had received more than 96,000 leads from the public. *Id.* at 12.

attacks – however unrelated the arrestee was to the investigation – were immediately classified as 'of interest' to the post-September-11th investigation." (Compl. ¶ 52.)

Plaintiffs and other "of high interest" detainees were confined in the ADMAX SHU, a special housing unit at the MDC created specifically to house post-September 11 detainees in highly restrictive conditions ("Administrative Maximum" refers to the most restrictive type of detention permitted under BOP procedures).[5] Plaintiffs allege that former Warden Hasty, Associate Warden Sherman, and Captain Salvatore Loprestri selected the officers to work in the ADMAX SHU. Further, plaintiffs allege that the procedures for handling detainees within this restrictive unit were developed by Sherman, Lopestri, and Lieutenant Joseph Cuciti at the request of Hasty.

As discussed below, the conditions in the ADMAX SHU were highly restrictive. Detainees were kept in solitary confinement. When they were moved, they were escorted by four officers and restrained with handcuffs and leg irons (a "four-man hold restraint policy"). Hand-held cameras were used to record detainee movements, and video cameras were placed in each cell.

For many weeks, Elmaghraby and other post-September 11 detainees were subjected to a communica-

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[5] *See* 28 C.F.R. § 541.22 ("Administrative detention is the status of confinement of an inmate in a special housing unit in a cell either by self or with other inmates which serves to remove the inmate from the general population."). Prior to September 11, the MDC had a special housing unit, but it did not have one designated as Administrative Maximum, which provides more restrictive confinement than normal SHUs. *See* April 2003 OIG Report at 118-119

tions blackout that barred them from receiving telephone calls, visitors, or mail. During this period, Elmaghraby and other detainees were unable to make contact with their attorneys or their families. In addition, MDC employees often turned away attorneys and family members by falsely stating that the individual detainee was no longer housed in the MDC. When detainees were allowed visitors, a clear partition separated the parties so that no physical contact was possible.

Plaintiffs and other post-September 11 detainees were not provided with the periodic individual reviews required by BOP regulations to determine whether their continued detention in the ADMAX SHU was appropriate.[6] Instead, post-September 11 detainees were held in the ADMAX SHU until the FBI "cleared" them of connections to terrorist activity and approved their release to the general population. Post-September 11 detainees remained in the ADMAX SHU until Michael Cooksey, the Former Assistant Director for the Correctional Programs of the BOP, issued a memorandum approving the release of the individual detainee into the general population unit.

Plaintiffs allege that this "hold until cleared" policy was approved by former Attorney General Ashcroft and FBI Director Mueller "in discussions in the weeks after September 11, 2001." (Compl. ¶ 69.) Further, plaintiffs allege that (1) on October 1, 2001, Cooksey directed that all "of high interest" detainees be confined in the most restrictive conditions possible until cleared by the FBI; (2) former BOP Director Hawk Sawyer

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[6] *See* 28 C.F.R. § 541.22(c) (requiring formal reviews and hearings for each inmate in administrative detention to determine whether their continued administrative detention is warranted).

was aware and approved of this policy of restrictive detention for "of high interest" detainees; (3) Rolince and Maxwell were responsible for determining whether a post-September 11th detainee had been "cleared" of any connection to terrorist activities; (4) FBI officials in Washington, D.C. were aware that the BOP relied on the FBI's "high interest" classification to determine whether to detain prisoners in the ADMAX SHU of the MDC; (5) notwithstanding that awareness, Ashcroft, Mueller, and Rolince failed to impose deadlines for the clearance process; (6) as a result, numerous detainees, including plaintiffs, were held in the ADMAX SHU for extended periods of time although there was no evidence linking them to terrorist activity; and (7) Rolince and Maxwell failed to approve post-September 11th detainees' release to the general population because of the detainees' race, religion, and national origin, and not on any evidence that continued detention in the ADMAX SHU was important or relevant to the FBI's investigation of the events of September 11, 2001.

B. Conditions of Confinement in the ADMAX SHU

Elmaghraby was arrested on September 30, 2001 by local and federal law enforcement agents. On October 1, 2001, Elmaghraby was brought to the MDC and housed in the ADMAX SHU. He remained confined in this highly restrictive unit throughout his detention at the MDC, until August 28, 2002. Iqbal was arrested on November 2, 2001 by INS and FBI agents. On November 5, 2001, Iqbal was taken to the MDC and housed in the general population on the fifth floor. He was transferred to the ADMAX SHU on January 8, 2002, and remained in detention there until the end of July 2002, at which time he was released back to the general population.

Plaintiffs allege that while detained in the ADMAX SHU they were (1) kept in solitary confinement; (2) prohibited from leaving their cells for more than one hour each day with few exceptions; (3) verbally and physically abused; (4) routinely subjected to humiliating and unnecessary strip and body-cavity searches, (5) denied access to basic medical care; (6) denied access to legal counsel; (7) denied adequate exercise and nutrition; (8) housed in small cells where the lights were left on almost 24 hours a day;[7] (9) deliberately subjected to air conditioning during the winter months and heat during the summer months; (10) deprived of adequate bedding or personal hygiene items;[8] and (11) they were deprived of adequate food, as a result of which Iqbal lost over 40 pounds (and suffers from persistent digestive problems) and Elmaghraby lost 20 pounds.

Plaintiffs further allege that they were subjected to continuous verbal abuse from the MDC staff. For example, Iqbal was called a terrorist by Zenk; "a terrorist and a killer," by Lieutenant Howard Gussak; a "Muslim bastard" by Officer Raymond Cotton; and a "Muslim killer" by Officer Perez. Elmaghraby was called a terrorist by Unit Manager Clemmett Shacks, was told that "a terrorist should not ask for anything" by Cotton, and, when he requested a pair of shoes, former Associate Warden of Programs Linda Thomas responded "no shoes for a terrorist."

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[7] The 24-hour lighting of the cells ended in March 2002. (Compl. ¶ 84.)

[8] For the first three months of his confinement, Elmaghraby was not given a blanket, pillow, mattress, or any toilet paper; Iqbal was never provided with pillows or more than one blanket.

Whenever plaintiffs were removed from their cells, they were handcuffed and shackled around their legs and waist. On the rare occasions when they were permitted to exercise, the officers subjected them to the harsh effects of the weather for purely punitive reasons. For example, during the winter months, MDC officers left Elmaghraby outside in the open-air recreation area for hours without a proper jacket or shoes. As the weather became milder, he was permitted to remain outside for only 15 minutes. In the summer months, when it was extremely hot and humid, Elmaghraby was again left outside for hours. Iqbal was also not provided with proper clothing when permitted to exercise in the winter. In addition, on certain days when it rained, Iqbal was left out in the open-air recreation area for hours. When he was brought back to his cell, drenched, officers turned on the air conditioner deliberately, causing him severe physical discomfort.

During their confinement in the ADMAX SHU, plaintiffs were never afforded any individualized review to determine whether their continued detention under highly restrictive conditions was appropriate.

C. Excessive Force

1. Elmaghraby

Elmaghraby alleges that on the day he arrived at the MDC, officers threw him against a wall, subjected him to repeated strip searches and threatened him with death. Officers continually accused him of being a terrorist associated with Osama Bin Laden, Al Qaeda, and the Taliban. When Elmaghraby was transported to court on the same day, officers subjected him to repeated strip searches and dragged him on

the ground while he was chained and shackled, causing him to bleed from his legs.

Later that day, upon his return to the MDC, Elmaghraby was brought to the ADMAX SHU by elevator (the unit is on the ninth floor of the MDC). In the elevator, MDC officers verbally and physically assaulted him, causing him to bleed from the nose. Although the officers carried a video camera with them, they turned it off while assaulting Elmaghraby.

On approximately December 1, 2001, while returning from recreation, Elmaghraby was pushed from behind by an MDC officer. He hit his face on a hard surface as a result, and broke his teeth.

2. Iqbal

Iqbal was transferred from the general population of the MDC to the ADMAX SHU on January 8, 2002. On that day, he was told by an officer that he had a legal visit. He was then taken to a room where 15 officers were waiting for him. Several of these officers picked Iqbal up and threw him against the wall, kicked him in the stomach, punched him in the face, and dragged him across the room. The officers screamed at Iqbal, that he was a "terrorist" and a "Muslim." Iqbal was then taken – shackled and chained around his arms, legs and waist, bleeding from his mouth and nose – to the ADMAX SHU.

On March 20, 2002, several MDC officers subjected Iqbal to three strip and body-cavity searches, all while he was in the same room. Although the officers had a hand-held video camera, they turned it off while conducting the searches. When the officers ordered Iqbal to submit to a fourth search, he protested. In response, one officer punched him in the face while

another punched and kicked him in the back and legs. As a result, Iqbal bled from the mouth. While escorting Iqbal back to the ADMAX SHU, the officers continued to physically and verbally harass Iqbal, kicking him and making racist and threatening comments about Muslims.

When they arrived at the SHU, the officers pulled Iqbal's arm through the slot in his cell door, causing him excruciating pain. An officer then urinated in the toilet in Iqbal's cell and turned the water off so the toilet could not be flushed until the next morning.

D. Strip and Body-Cavity Searches

1. Elmaghraby

During the first three or four months of Elmaghraby's detention, he was strip searched every morning. MDC officers ordered him to take off his clothes and inspected him through the slot in the door before they entered the cell. In addition to these searches, Elmaghraby was strip and body-cavity searched six times on days he went to court – three times before going to court, and three times on his return. On such days, Elmaghraby would be searched first in his cell in the ADMAX SHU, then in a different room in the ADMAX SHU, and a third time on the ground floor of the MDC before going to court. Elmaghraby remained in the custody of MDC officers between the three searches. When Elmaghraby returned from court, the searches took place in reverse order. During these searches, Elmaghraby was ordered to pass his clothes to an officer and bend over while an officer used a flashlight to search his body cavities. [9]

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[9] These searches took place on October 1 and 2, November 5 and 8, and December 11, 2001; and January 8, February 12 and 13, and July 22, 2002.

While the strip and body-cavity searches were being conducted, Elmaghraby was threatened, verbally abused, and regularly pushed and shoved. On many occasions, the searches were conducted in an outrageous manner. Lieutenant Barrere once displayed Elmaghraby, naked, to a female MDC employee. On October 1, 2001, Barrere inserted a flashlight into Elmaghraby's anal cavity. Elmaghraby saw blood on the flashlight when it was removed. On two occasions (involving two different officers), an MDC defendant pushed a pencil into Elmaghraby's anal cavity during a search. Other officers were present during all of these searches.

2. Iqbal

Each morning, MDC officers first searched Iqbal's cell. During this search, he was chained and shackled, and he was routinely kicked and punched by the officers. After the cell was searched, the officers would conduct a strip and body-cavity search of Iqbal. In addition to these daily strip and body-cavity searches, Iqbal was subjected to three strip searches whenever he visited the medical clinic for treatment – one before the visit and two afterwards. On days he went to court, Iqbal was searched four times: in his cell at about 5:30 a.m. (as was done each morning); at about 7:40 a.m. on the first floor of the MDC; and twice on his return from court.[10]

Iqbal too was often searched in an outrageous manner. For example, as described above, on March 20, 2005, several MDC officers conducted three strip and body-cavity searches of Iqbal on a single occasion, and

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[10] These searches occurred on February 19, March 6 and 20, and April 22, 2002.

when he protested against a fourth, he was punched and kicked in response.

E. Interference with Religious Practice

During the entire time plaintiffs were confined in the ADMAX SHU, MDC officers constantly interfered with their religious practices and beliefs. Such interference included banging on plaintiffs' cells while they were praying, routinely confiscating their copies of the Koran, and refusing to permit plaintiffs to participate in Friday prayer services with fellow Muslims. When plaintiffs requested to join fellow Muslims for Friday prayers, officers made comments such as, "No prayer for terrorists," and "Why do you need to pray when you are in jail?" Elmaghraby complained about this interference to Hasty and Zenk, among others, and they refused to take any action to remedy the situation.

F. Interference with Right to Counsel

The MDC defendants deliberately interfered with plaintiffs' attempts to communicate with their criminal defense counsel. From October 1 to November 1, 2001, Corrections Officer Cotton, the ADMAX SHU counselor responsible for determining whether and when detainees were permitted visits or phone calls, prohibited Elmaghraby from speaking by telephone with his attorney. After November 1, 2001, Cotton stood near Elmaghraby when he spoke to his attorney by telephone, and disconnected the phone whenever Elmaghraby complained about the conditions of his confinement. When Elmaghraby's attorney tried to visit him, she often waited for hours without seeing him. When they were able to meet, a video camera recorded the visit, and when Elmaghraby returned to his cell, he would find that it

had been ransacked. On these occasions, Elmaghraby would be strip searched after the legal visit even though the visit was non-contact,.

When Iqbal spoke to his attorney by telephone, Cotton would disconnect the phone if he complained about the conditions of his confinement. On several occasions, Iqbal's attorney was turned away from the MDC after being falsely informed that Iqbal had been transferred to another facility. In addition, Defendant Shacks routinely delayed Iqbal's receipt of legal mail, sometimes by up to two months.

G. Medical Care

On December 1, 2001, Elmaghraby was shoved by an MDC officer into a hard object and broke his teeth. Nina Lorenzo, a physician's assistant, provided Elmaghraby with antibiotics for his injury, but they were confiscated by Lieutenant Ortiz when Elmaghraby returned to the ADMAX SHU. When Elmaghraby complained to Shacks about the confiscation, Shacks asked him why he needed his teeth. Plaintiffs also allege that Lorenzo misdiagnosed Elmaghraby's hypothyroidism as asthma. After Lorenzo prescribed asthma medicine, Elmaghraby's hypothyroidism became worse, and he had to undergo surgery as a result.

On March 21, 2002, the day after Iqbal was beaten by MDC officers, he requested medical assistance from Lorenzo. Shacks, however, told Lorenzo to leave the ADMAX SHU without providing any medical assistance, and Iqbal did not receive any medical care for two weeks after this assault, despite the fact that he was suffering excruciating pain.

H. Personal Involvement

Plaintiffs allege that all defendants were personally involved in creating or implementing the policy under which they were confined without recourse to procedures for challenging their confinement. Plaintiffs allege that defendants were not only aware of the conditions of their confinement, but agreed to subject plaintiffs to those conditions because of their race, religion, and national origin.

Plaintiffs allege that the physical and verbal abuse to which they were subjected, the unnecessary and abusive strip and body-cavity searches, the interference with religious practices, and the imposition of substantial restrictions on their ability to communicate with counsel were all components of a discriminatory policy for which high-level BOP and MDC officials bear personal liability. In general, plaintiffs assert that the BOP Defendants and the Wardens either (1) created or implemented these practices; (2) knew or should have known that their subordinates were engaging in the unlawful practices; or (3) knowing that these practices were taking place, failed to remedy them.

I. Summary of Plaintiffs' Claims

Plaintiffs bring the following claims:

1. The conditions of confinement in the ADMAX SHU, and the failure to take measures to remedy those conditions, violated their due process rights under the Fifth Amendment. Plaintiffs assert this claim against the Wardens and other MDC defendants.[11]

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[11] Plaintiffs have withdrawn claims 1, 8, 12, and 13 against Lorenzo. *See* Opp'n Br at 2 n.2. Plaintiffs have also withdrawn

2. The policy of assigning plaintiffs to the ADMAX SHU without affording them the opportunity to challenge their continued administrative detention violated their due process rights under the Fifth Amendment. Plaintiffs assert this claim against Ashcroft, the FBI Defendants, the BOP Defendants, the Wardens, and other MDC defendants.

3-4. The intentional beatings to which plaintiffs were subjected, and the failure to take measures to prevent these beatings, violated plaintiffs' right to due process under the Fifth Amendment, and the Eighth Amendment's prohibition against cruel and unusual punishment. Plaintiffs assert these claim against Hasty and other MDC defendants.

5. The policy of interfering with plaintiffs' access to counsel violated plaintiffs' right to counsel under the Sixth Amendment. Plaintiffs assert this claim against Hasty and other MDC defendants.

6-7. The denial of adequate medical examination and care violated plaintiffs' right to due process under the Fifth Amendment and the Eighth Amendment's prohibition against cruel and unusual punishment. Plaintiffs assert these claims against Lorenzo and other MDC defendants.

8. The conditions of confinement that plaintiffs were subjected to in the ADMAX SHU, and the failure to take measures to remedy those conditions, violated the Eighth Amendment's prohibition against cruel and unusual punishment. Plaintiffs assert this

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claims 3, 4, 5, and 15 against Zenk. *See* letter from Alexander A. Reinert to the Court dated November 4, 2004; Opp'n Br. at 1 n.1. Those claims against Lorenzo and Zenk are hereby dismissed.

claim against the Wardens and other MDC defendants.

9. The policy of subjecting plaintiffs to unreasonable strip and body-cavity searches, and the failure to remedy such a policy, violated the Fourth Amendment's prohibition against unreasonable searches. Plaintiffs assert this claim against Hawk Sawyer, the Wardens, and other MDC defendants.

10. The policy of interfering with plaintiffs' religious practices, and the failure to remedy such a policy, violated plaintiffs' free exercise rights under the First Amendment. Plaintiffs assert this claim against the Wardens, and other MDC defendants.

11. The policy of subjecting plaintiffs to harsher conditions of confinement because of their religious beliefs, and the failure to remedy such a policy, violated plaintiffs' rights under the First Amendment. Plaintiffs assert this claim against Ashcroft, the FBI Defendants, the BOP Defendants, the Wardens, and other MDC defendants.

12. The policy of subjecting plaintiffs to harsher conditions of confinement because of their race, and the failure to remedy such a policy, violated plaintiffs' rights to equal protection under the Fifth Amendment. Plaintiffs assert this claim against all defendants.

13. The policy of subjecting plaintiffs to harsher conditions of confinement because of their religious beliefs, and the failure to remedy such a policy, substantially burdened their religious exercise, in violation of RFRA, 42 U.S.C. § 2000bb. Plaintiffs assert this claim against all defendants.

14. The policy of confiscating plaintiffs' religious materials, regularly interrupting their daily prayers, and denying them access to Friday communal prayers, and the failure to remedy such a policy, substantially burdened plaintiffs' religious exercise and belief, in violation of RFRA. Plaintiffs assert this claim against the Wardens, and other MDC defendants.

15. By brutally beating and verbally abusing plaintiffs because of their religious beliefs, and by failing to take measures to remedy such abuse, defendants imposed a substantial burden on plaintiffs' religious exercise, in violation of RFRA. Plaintiffs assert this claim against Hasty and other MDC defendants.

16-17. The agreements among various defendants to deprive plaintiffs of the equal protection and equal privileges and immunities of the laws because of their religious beliefs, race, and national origin violated the civil rights conspiracy statute, 42 U.S.C. § 1985(3). Plaintiffs assert that (1) Ashcroft, Mueller, the BOP Defendants and the Wardens, among others, agreed to subject plaintiffs to unnecessarily harsh conditions of confinement without due process; (2) the BOP Defendants and the Wardens, among others, agreed to subject plaintiffs to unnecessary and extreme strip and body-cavity searches as a matter of policy; and (3) the Wardens and other MDC defendants agreed to substantially burden Elmaghraby's religious practice while he was housed in the ADMAX SHU.

18-20. The beatings of Iqbal and the failure to prevent those beatings; the negligent medical care Iqbal received; and the brutal conduct that caused him to suffer extreme and lasting emotional distress constitute torts for which Iqbal seeks compensatory

damages from the United States pursuant to the FTCA, 28 U.S.C. § 2671 *et seq.*

21. The cruel, inhuman and degrading treatment plaintiffs were subjected to violated international law. Plaintiffs assert a claim for this violation under the Alien Tort Statute, 28 U.S.C. § 1350, against all defendants.

DISCUSSION

A. The Motion to Dismiss Standard

In considering a motion to dismiss under Rule 12(b)(6), a federal court is required to accept as true the factual assertions in the complaint and construe all reasonable inferences in favor of the plaintiff. *Walker v. City of New York*, 974 F.2d 293, 298 (2d Cir. 1992). Dismissal may be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (internal quotation omitted). Thus, a federal court's task in determining the sufficiency of a complaint is "necessarily a limited one." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The appropriate inquiry is "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Id.; see also Swierkiewicz v. Sorema* N.A., 534 U.S. 506, 514 (2002) ("A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.") (internal quotation omitted).

B. Personal Jurisdiction

Those defendants who are not domiciled in New York State – Ashcroft, the FBI defendants, and the BOP defendants – have moved to dismiss under Rule 12(b)(2), asserting that this Court lacks personal jurisdiction over them.

Personal jurisdiction must be established under the law of the state where the federal court sits. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 784 (2d Cir. 1999); Fed. R. Civ. P. 4(k)(1)(A). Under New York's long-arm statute, a court may exercise jurisdiction over any non-domiciliary if "in person or through an agent," he "transacts any business within the state," or "commits a tortious act within the state" and the cause of action arises from those acts. *See* N.Y. C.P.L.R. § 302(a)(1), (2). The statute's purpose is to "extend the jurisdiction of New York courts over nonresidents who have 'engaged in some purposeful activity [here] in connection with the matter in suit.'" *Padilla v. Rumsfeld*, 352 F.3d 695, 709 (2d Cir. 2003), *rev'd on other grounds*, 542 U.S. 426 (2004) (quoting *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 457 (1965)). One transaction is sufficient to support jurisdiction under § 302 "so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." *Kreutter v. McFadden Oil Corp.*, 71 N.Y. 2d 460, 467 (1988); *cf. Kronisch v. United States*, 150 F.3d 112, 130 (2d Cir. 1998) (there must be an "articulable nexus" between the defendant's actions and the asserted claim). Personal jurisdiction cannot be based solely on a defendant's supervisory position. *See Ontel Prods., Inc. v. Project Strategies Corp.*, 899 F. Supp. 1144, 1148 (S.D.N.Y. 1995). Instead, a plaintiff must show that defendant

"personally took part in the activities giving rise to the action at issue." *Id.*

Here, plaintiffs allege that defendants were personally involved in the creation or implementation of unconstitutional policies that were directed at the post-September 11 detainees confined in the ADMAX SHU of the MDC. Such personal involvement, if established, satisfies § 302(a)(1)'s requirement that there be a substantial relationship or nexus between the defendant's action and the asserted claim.

As a defense on the merits of plaintiffs' claims, defendants assert that they were not personally involved in the alleged unconstitutional activity. This defense overlaps with defendants' jurisdictional argument, that is, a lack of personal involvement precludes both liability on the merits and the assertion of personal jurisdiction. *See Richardson v. Goord*, 347 F.3d, 431, 435 (2d Cir. 2003)(mere linkage in the prison chain of command insufficient to confer liability for constitutional torts); *Nwanze v. Philip Morris Inc.*, 100 F. Supp. 2d 215, 220 (S.D.N.Y. 2000) ("Mere supervision over the Bureau of Prisons, the reach of which extends into every state, is insufficient to establish a basis for the exercise of personal jurisdiction.").

Accordingly, motions to dismiss for lack of personal jurisdiction are properly granted where plaintiffs have failed to sufficiently allege defendants' involvement in any of the alleged violations of plaintiffs' rights. Where such involvement is adequately alleged and discovery is required to determine the extent of personal involvement, such discovery will likewise resolve the jurisdictional question as well. *See Newbro v. Freed*, 2004 WL 691392, at *3 (S.D.N.Y. March 31, 2004) (discovery to resolve question of personal

jurisdiction proper where plaintiff has "established that his jurisdictional position is not frivolous.").

C. Qualified Immunity Generally

The defendants seek dismissal of all claims against them on qualified immunity grounds. Government officials performing discretionary functions enjoy qualified immunity and are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "As a general rule, [state actors] are entitled to qualified immunity of (1) their conduct does not violate clearly established constitutional rights, or (2) it was objectively reasonable for them to believe their acts did not violate those rights." *Oliveira v. Mayer*, 23 F.3d 642, 648 (2d Cir. 1994).[12]

Whether a right was clearly established at the relevant time is a question of law. *Kerman v. City of New York*, 374 F.3d 93, 108 (2d Cir. 2004). The inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 125 S. Ct. 596, 599 (2004) (internal quotation omitted). Accordingly, a court must determine the level of generality of the relevant legal rule. *Cf. Wilson v. Layne*, 526 U.S. 603, 615 (1999) (it "could plausibly be asserted that any violation of the Fourth Amendment is 'clearly established' since it is clearly established that the protections of the Fourth Amendment apply to the actions of police."). The precise act challenged need not have

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[12] The qualified immunity standard in *Bivens* cases is identical to the standard employed in cases brought under 42 U.S.C. § 1983. *See Wilson v. Layne*, 526 U.S. 603, 609 (1999).

previously been held unlawful in order to defeat qualified immunity, but, its unlawfulness must be "apparent" in light of pre-existing law. *Id.* at 615; *cf. Back v. Hastings on Hudson Union Free School Dist.*, 365 F.3d 107, 129 (2d Cir. 2004) (the right in question "must not be restricted to the factual circumstances under which it has been established.").

In contrast to the "clearly established" law inquiry, "the matter of whether a defendant's official conduct was objectively reasonable, *i.e.*, whether a reasonable officer would reasonably believe his conduct did not violate a clearly established right, is a mixed question of law and fact." *Kerman*, 374 F.3d at 109. If there is a genuine dispute as to material historical facts, those must be resolved by the factfinder before the court can properly make the ultimate legal determination of whether the defense is available. *Id.*; *see also Poe v. Leonard*, 282 F.3d 123, 133 (2d Cir. 2002) ("if the court determines that the only conclusion a rational jury could reach is that reasonable officers would disagree about the legality of the defendant's conduct under the circumstances, qualified immunity applies.") (internal quotation omitted).

The defense is not unavailable on a motion to dismiss. *See McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004). However, a defendant asserting qualified immunity in a pre-discovery motion faces a "formidable hurdle":

> Not only must the facts supporting the defense appear on the face of the complaint, but as with all 12(b)(6) motions, the motion may be granted only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to

> relief. Thus, the plaintiff is entitled to all reasonable inferences from the facts alleged, not only those that support his claim, but also those that defeat the immunity defense.

Id. at 434, 443 (internal citations and quotation omitted).

1. Allegations of Personal Involvement

A government official may not be held liable for a constitutional tort under a theory of *respondeat superior*; instead, a plaintiff must establish that the official was personally involved in the alleged violations. *Richardson*, 347 F.3d at 435 (discussing supervisory liability in the context of a § 1983 claim); see also Wilson, 526 U.S. at 609 (explaining that the qualified immunity analysis under *Bivens* is identical to the analysis under § 1983); *Poe*, 282 F.3d at 134 (qualified immunity analysis depends upon an individualized determination of the misconduct alleged). Here, the parties disagree about how specific and "nonconclusory" an allegation of personal involvement must be in order to survive a motion to dismiss where the defense of qualified immunity has been asserted. This disagreement exposes a tension between the liberal pleading standards under the Federal Rules and one of the core purposes of qualified immunity – protecting public officials from the burdens of discovery against unmeritorious claims.

To survive a motion to dismiss, a plaintiff need only provide a statement that gives the defendant "'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *See Swierkiewicz*, 534 U.S. at 512 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Rule 8(a)'s simplified pleading standard applies to "all civil actions, with limited exceptions,"

such as Rule 9(b)'s requirement that allegations of fraud and mistake be pleaded with particularity. *See id.* at 513. Thus, whether the allegations in a complaint are too conclusory to survive a motion to dismiss depends upon whether they meet the permissive standard set forth in Rule 8(a). The expectation that a defendant will assert qualified immunity as a defense does not elevate a plaintiff's pleading requirements. *See McKenna*, 386 F.3d at 434 (defendant asserting qualified immunity at 12(b)(6) stage faces "formidable hurdle").[13]

Defendants argue, however, that a plaintiff must allege a quantum of nonconclusory facts to survive a motion to dismiss. In support of this standard, they rely primarily on dicta in *Crawford-El* that in order to protect "the substance of the qualified immunity defense," a court may insist at the pre-discovery stage that a plaintiff put forward "specific, nonconclusory factual allegations." 523 U.S. at 598, 600. To the extent that this dicta suggests a heightened pleading

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[13] In recent years the Supreme Court has repeatedly rejected judicially-created heightened pleading standards in favor of the liberal notice-pleading requirement of Federal Rule of Civil Procedure 8(a). *See Swierkewicz*, 534 U.S. at 514-15 (rejecting a heightened pleading standard for employment discrimination); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993) (same; municipal liability under § 1983); *Gomez v. Toledo*, 446 U.S. 635, 639-40 (1990) (plaintiff need not allege bad faith to state a claim against a public official who might be entitled to immunity if he acted in good faith); *cf. Crawford-El v. Britton*, 523 U.S. 574, 595 (1998) (rejecting heightened evidentiary standard for § 1983 cases alleging unconstitutional motive). In *Swierkewicz*, the Court reiterated that a requirement of greater specificity at the pleading stage "is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" 534 U.S. at 515 (quoting *Leatherman*, 507 U.S. at 168).

requirement, such a requirement is foreclosed by *Swierkewicz*. *See, e.g., Educadores Puertorriquenos en Accion v. Hernandez*, 367 F.3d 61, 65 (1st Cir. 2004) (although some courts post- *Crawford-El* required heightened pleading in civil rights cases in order not to erode the qualified immunity doctrine, "[w]hatever window of opportunity we thought remained open after *Crawford-El* has been slammed shut by the Supreme Court's subsequent decision in *Swierkiewicz*."); cf. *Phelps v. Kapnolas*, 308 F.3d 180, 186-87 (2d Cir. 2002) ("However unlikely it may appear to a court from a plaintiff's complaint that he will ultimately be able to prove an alleged fact such as mental state, the court may not go beyond FRCP 8(a)(2) to require the plaintiff to supplement his pleadings with additional facts that support his allegation of knowledge either directly or by inference.").

Second, while the *Crawford-El* Court stated that the question of qualified immunity should be resolved before permitting discovery, 592 U.S. at 598, it also recognized that such a pre-discovery determination may not be possible:

> [D]iscovery involving public officials is indeed one of the evils that *Harlow* aimed to address, but neither that opinion nor subsequent decisions create an immunity from *all* discovery. *Harlow* sought to protect officials from the costs of "broad- reaching" discovery, and we have since recognized that limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment on qualified immunity.

Id. at 592 n.14 (citation omitted); *Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768, 793 (2d Cir. 2002) (ruling on qualified immunity defense premature

where issue "turns on factual questions that cannot be resolved at [the motion to dismiss stage]"); *cf. Gomez*, 446 U.S. at 641 (whether qualified immunity has been established "depends on facts peculiarly within the knowledge and control of the defendant.").

Where the qualified immunity question cannot be resolved at the motion to dismiss stage, a court "should give priority to discovery concerning issues that bear upon the qualified immunity defense, such as the actions that the official actually took, since that defense should be resolved as early as possible." *Crawford-El*, 523 U.S. at 600; *cf. Velez v. Levy*, 401 F.3d 75, 101 (2d Cir. 2005) (while defendant is not entitled to qualified immunity on motion to dismiss, the "factual basis for qualified immunity may arise as the proceedings develop."). The *Crawford-El* Court suggested ways for district courts to manage the process while attempting to protect officials from the burdens of litigation, such as limiting discovery under Federal Rule of Civil Procedure 26. 523 U.S. at 599-600; *see also Jacobs v. City of Chicago*, 215 F.3d 758, 775 (7th Cir. 2000) (Easterbrook, J., concurring) ("If immunity doctrines require decisions without discovery (or with limited discovery), then district judges must use their authority under Rule 26(b)(2) and (c) to curtail or eliminate discovery and decide on the basis of affidavits and other evidence that can be produced without compulsory process. Immunity does not justify decision on the basis of allegations instead of evidence (which is what judgment under Rule 12 entails) or a pretense that a complaint . . . doesn't state a claim on which relief may be granted.").

In sum, *Crawford-El, Swierkewicz*, and *McKenna* suggest the following principles when evaluating qualified immunity at the motion to dismiss stage: (1) a

complaint must meet Rule 8(a)'s requirements: fair notice of the claims asserted and the grounds upon which they rest; (2) the plaintiff is entitled to all reasonable inferences from the facts alleged in the complaint, including those that defeat the immunity defense; (3) where there is a factual dispute bearing on the qualified immunity question, that dispute should be resolved at the earliest opportunity; and (4) to resolve such a dispute, it may be appropriate to limit discovery in scope (to issues that bear on the qualified immunity defense) and manner.

D. *Bivens* Actions Generally

In *Bivens*, the Supreme Court held that a private cause of action under the Constitution was available to recover damages against federal officers for violations of Fourth Amendment rights. 403 U.S. at 389. This cause of action was later extended to allow recovery for other constitutional violations. *See, e.g., Davis v. Passman*, 442 U.S. 228, 248-49 (1979) (Fifth Amendment); *Carlson v. Green*, 446 U.S. 14, 20 (1980) (Eighth Amendment); *Bush v. Lucas*, 462 U.S. 367, 377-380 (1983) (refusing to allow a *Bivens* suit on the ground that Congress had created adequate alternative remedies, but generally recognizing the existence of such a cause of action for violations of the First Amendment). Courts generally treat *Bivens* claims as analogous to the cause of action created by 42 U.S.C. § 1983, which permits recovery for federal rights violations by state officials. *See Wilson*, 526 U.S. at 609 (qualified immunity analysis identical for *Bivens* and § 1983 actions); *Butz v. Economou*, 438 U.S. 478, 498-99 (1978) (treating a *Bivens* claim as directly analogous to a § 1983 claim).

The Supreme Court has carved out two, potentially intersecting, exceptions to the availability of *Bivens*

damages. A *Bivens* remedy is unavailable (1) "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective," *Carlson*, 446 U.S. at 18-19 (emphasis in original); and (2) where there are "special factors counseling hesitation in the absence of affirmative action by Congress." *Id.* (internal quotation omitted); *see, e.g., United States v. Stanley*, 483 U.S. 669, 683-84 (1987) (holding that the unique disciplinary structure of the military constituted "special factors counseling hesitation" such that no *Bivens* remedy "is available for injuries that arise out of or are in the course of activity incident to service") (internal quotation omitted); *Bush*, 462 U.S. at 388-89 (refusing to extend a *Bivens* claim to a federal employee in light of the comprehensive scheme Congress had established over the field of federal employment).

Ashcroft argues that there are special factors present here that militate against the availability of a remedy under *Bivens*. Specifically, he argues that (1) to the extent plaintiffs are challenging their detention pending removal, the immigration statutes provide a comprehensive remedial scheme; and (2) plaintiffs' claims arise within the context of the September 11 attacks and their aftermath.

I reject the contention that these features of the case constitute "special factors" militating against the provision of a *Bivens* remedy. First, while many post-September 11 detainees were held on immigration charges, plaintiffs here were detained on criminal charges. They challenge their treatment as criminal defendants, and not their detention pending removal. Second, our nation's unique and complex law enforce-

ment and security challenges in the wake of the September 11, 2001 attacks do not warrant the elimination of remedies for the constitutional violations alleged here. *Cf. Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648 (2004) ("it is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested."). This does not mean the context in which the challenged actions occurred is irrelevant. Rather, the qualified immunity standard takes that context into account, shielding officials from liability unless it is clear from preexisting law that the official's actions are unlawful under the circumstances. However, the qualified immunity

> standard will not allow the Attorney General to carry out his national security functions wholly free from concern for his personal liability; he may on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States. But this is precisely the point of the *Harlow* standard: "Where an official could be expected to know that his conduct would violate statutory rights, he *should* be made to hesitate . . . ." *Harlow*, 457 U.S. at 819. This is as true in matters of national security as in other fields of governmental action.

Mitchell v. Forsyth, 472 U.S. 511, 524 (1985). The problems posed by issues of national security are not akin to those posed by military service, where the need for a separate system of military justice precludes the provision of a *Bivens* remedy. *See Chappell v. Wallace*, 462 U.S. 296, 304 (1983); *Stanley*, 483 U.S. at 683-84.

As in § 1983 actions, there is no respondeat superior liability in a *Bivens* action. *Cuoco v. Moritsugu*, 222 F.3d 99, 110 (2d Cir. 2000). To hold a supervisory official liable under § 1983 (and thus under *Bivens*), a plaintiff must show one or more of the following:

> (1) actual direct participation in the constitutional violation, (2) failure to remedy a wrong after being informed through a report or appeal, (3) creation of a policy or custom that sanctioned conduct amounting to a constitutional violation, or allowing such a policy or custom to continue, (4) grossly negligent supervision of subordinates who committed a violation, or (5) failure to act on information indicating that unconstitutional acts were occurring.

Richardson, 347 F.3d at 435; *see also Johnson v. Newburgh Enlarged School District*, 239 F.3d 246, 254 (2d. Cir. 2001). Mere linkage in the prison chain of command is insufficient to implicate a supervisory prison official. *Richardson*, 347 F.3d at 435.

With these general principles in mind, I turn to plaintiffs' claims in this case.

E. Plaintiffs' *Bivens* Claims

1. Conditions of Confinement Claims

a. Substantive Due Process and Cruel and Unusual Punishment (Claims 1& 8)

Plaintiffs allege that the conditions of their confinement violated their substantive due process rights under the Fifth Amendment and constitute cruel and unusual punishment under the Eighth Amendment. Wardens Hasty and Zenk contend that (1) the conditions of confinement did not violate plaintiffs' clearly

established due process rights; and (2) plaintiffs have failed to allege sufficient personal involvement on the part of the Wardens in imposing those conditions to hold them liable under *Bivens* or to defeat their claims of qualified immunity.

The Due Process Clause protects pretrial detainees – persons who have been charged with a crime but have yet to be found guilty of the charge – from certain conditions and restrictions of pretrial detainment. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). Specifically, a pretrial detainee has the right to be free from punishment prior to an adjudication of guilt in accordance with due process of law.[14] *Id.* This does not mean, however, that a detainee may not be subject to significant restrictions. The maintenance of an institution's security and discipline are "essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Id.* at 546. Prison administrators are "accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve

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[14] Once an inmate is sentenced he may be "punished," but that punishment may not be cruel and unusual. *Bell*, 441 U.S. at 535 n.16. To state a claim of unconstitutional conditions under the Eighth Amendment, an inmate must show that inhumane conditions were imposed with deliberate indifference. *See Wilson v. Seiter*, 501 U.S. 294, 303 (1991) ("deliberate indifference" standard articulated in *Estelle v. Gamble*, 429 U.S. 97 (1976), for a claim of inadequate medical care applies to claims of inhumane conditions of confinement). Here, the allegations concerning conditions of confinement stem largely from the period when plaintiffs were pretrial detainees. Elmaghraby was a pretrial detainee for almost 10 of the 11 months that he was confined in the ADMAX SHU; Iqbal was a pretrial detainee throughout the entire time he was confined in the ADMAX SHU.

internal order and discipline and to maintain institutional security." *Id.* at 547. Thus, "if a particular condition or restriction of pretrial detention is reasonably related to a legitimate government objective, it does not, without more, amount to 'punishment.'" *Id.* at 539. Conversely, where a condition is not reasonably related to a legitimate goal, "a court permissibly may infer that the purpose of the governmental action is punishment." *Id.*

Warden Zenk argues that plaintiffs have failed to state a claim primarily because the alleged conditions were reasonably related to legitimate penological goals and thus did not amount to punishment. Zenk argues, for example, that (1) segregating Muslims in the aftermath of the September 11 attacks "served the important non-punitive purpose of protecting [post-September 11 detainees] from possible assault in the general prison population;" (2) strip and body-cavity searches ensure that detainees do not carry contraband into their cells (and the Supreme Court expressly validated visual body-cavity searches of pretrial detainees after contact visits, *see Bell* at 558-560); and (3) restricting toilet paper is justified because it can be used to set fires and clog toilets. *See Zenk* Br. at 16-19.

Plaintiffs do not contend, however, that legitimate security interests could never justify some of the conditions which they were subjected to, such as strip and body-cavity searches. Instead, they allege that they were subjected to harsh conditions of confinement for purely punitive reasons. These conditions included: verbal and physical abuse; purposeless and abusive strip and body-cavity searches; the denial of access to basic medical care and hygiene; the denial of proper exercise; and confinement in solitary

confinement with the lights on almost 24 hours per day.

In short, while defendants posit legitimate reasons that might justify the conditions in the ADMAX SHU, plaintiffs assert illegitimate reasons for those conditions. A restriction or condition that under some circumstances has a legitimate justification cannot be inflicted upon detainees where no such justification exists. *See Bell* 441 U.S. at 539 (where a restriction or condition is arbitrary or purposeless, a court may infer that the purpose of the governmental action is punishment). Here, the determination whether the conditions imposed upon plaintiffs were legitimate or punitive is not amenable to resolution on a motion to dismiss.

In this procedural setting, I assume the truth of plaintiffs' allegations and draw all inferences in their favor. While a court will normally defer to a prison administrator's expert judgment on security matters, *see Bell*, 441 U.S. at 540 n.23, such deference is inappropriate "where there is substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations." *Id.; cf. United States v. Gotti*, 755 F. Supp. 1159, 1164 (E.D.N.Y. 1991) ("due deference does not mean blind deference"). Without such a record, a court may not be able to determine the reasonableness or legitimacy of an allegedly punitive condition of confinement. *See Bell* at 541-63 (evaluating reasonableness of restrictions, including strip searches conducted after contact visits, on a full evidentiary record). The cases cited by Zenk to support the legitimacy of the conditions of the ADMAX SHU are not to the contrary. *Morreale v. Cripple Creek*, 113 F.3d 1246 (table), 1997 WL 290976 (10th Cir. May 27, 1997)

(unpub. op.) (decision on summary judgment); *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996) (same); *Davenport v. DeRobertis*, 844 F.2d 1310 (10th Cir. 1988) (decision after full trial); *Hay v. Waldron*, 834 F.2d 481 (5th Cir. 1987) (review of denial of preliminary injunction); *Goff v. Nix*, 803 F.2d 358 (8th Cir. 1987) (review of grant of permanent injunction).

(i) Personal Involvement

The Wardens argue that plaintiffs have failed to allege sufficient personal involvement in the violation of their due process rights to state a *Bivens* claim or defeat a defense of qualified immunity. Hasty argues, for example, that the conditions of confinement claims are premised on supervisory liability, and that plaintiffs allege only "the most attenuated, superficial connection between Hasty's supervisory responsibilities at MDC and the alleged conduct of his subordinates." Hasty Reply Br. at 1-2.

The Wardens elide the difference between vicarious liability under the doctrine of *respondeat superior* (which is not available under *Bivens*) and the liability of a supervisor based on his own actions or inactions). Hasty's argument that he "had no meaningful contact with Plaintiffs'" during their confinement, *see* Reply Br. at 1, misapprehends the type of personal involvement that must be alleged to state a claim of supervisory liability. An allegation, for example, that a supervisor was aware of a constitutional violation but took no action to remedy it may be sufficient to state a claim. *See Johnson*, 239 F.3d at 255 (denying motion to dismiss asserting qualified immunity where plaintiff alleged that supervisors failed to act on "information that unconstitutional acts were occurring" at the hands of subordinates); *McKenna*, 386 F.3d at

437 (allegation that prison superintendents allowed the continuation of unlawful policies sufficient to defeat assertion of qualified immunity at motion to dismiss stage); *cf. Richardson*, 347 F.3d at 435 (supervisors may be liable for, among other things, creation of a policy that sanctioned unconstitutional conduct, grossly negligent supervision, or failure to act on information indicating that unconstitutional conduct was occurring).

Plaintiffs allege, among other things, that both Wardens were aware of the abusive conditions of the ADMAX SHU and allowed plaintiffs to be subjected to those conditions for purely punitive reasons. The Wardens contend otherwise, but that dispute may properly be resolved only on summary judgment or at trial.[15]

b. Procedural Due Process (Claim 2)

Plaintiffs allege that Ashcroft, the FBI Defendants, the BOP defendants, and the Wardens, among others, violated their right to due process by creating or implementing a policy of confining plaintiffs in highly restrictive conditions without making individual deter-

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[15] Zenk argues that all claims against him should be dismissed because "substantially all" of the specific allegations of abuse are alleged to have occurred before he became warden on April 22, 2002. Zenk Reply Br. at 2. Plaintiffs concede that certain conditions – specifically the denial of basic hygiene items and inadequate lighting – took place prior to Zenk's tenure, and they do not assert claims against Zenk on those grounds. Plaintiffs allege, however, that Zenk was personally involved in subjecting plaintiffs to unconstitutional conditions of confinement and for failing to remedy those conditions. Zenk cannot, of course, be held liable for acts that occurred prior to his becoming warden. The extent of his personal involvement, if any, in the conditions alleged during the period he was warden is a matter for discovery.

minations as to the appropriateness of such confinement and without allowing plaintiffs to challenge their continued detention under those conditions. Defendants argue that they are entitled to qualified immunity because (1) there was no violation of a constitutionally protected right because plaintiffs cannot establish a protectable liberty interest; and (2) if there was a protectable liberty interest, it was not clearly established in the aftermath of the September 11 attacks; and (3) in any event, the defendants' actions were objectively reasonable. They also contend that plaintiffs have failed adequately to allege their personal involvement in the charged conduct.

(i) Whether a Protectable Liberty Interest Existed

In determining whether a prisoner has stated a claim for a procedural due process violation, a court evaluates: "(1) whether the plaintiff had a protected liberty interest in not being confined and, if so, (2) whether the deprivation of that liberty interest occurred without due process of law." *Tellier v. Fields*, 280 F.3d 69, 79-80 (2d Cir. 2000) (internal quotation and ellipsis omitted). Plaintiffs allege that they received no process at all with regard to their continued detention in the ADMAX SHU. Thus, the issue here is whether they assert a protectable interest. In *Tellier*, the plaintiff was held in a Special Housing Unit at the Metropolitan Correction Center ("MCC")[16] because he was considered a flight risk. *Id.* at 74. He remained in the SHU for 514 days without an opportunity to be heard regarding his continued

[16] The MCC is the federal detention facility in Manhattan. The MDC, the facility in which plaintiffs were detained, is in Brooklyn.

confinement in segregated housing. *Id.* The defendants, including the MCC's former and current wardens, moved to dismiss for failure to state a claim and for summary judgment based on qualified immunity. *Id.* at 73, 79. The Second Circuit held that Tellier had a protectable liberty interest because (a) the alleged SHU conditions were "atypical and significant";[17] and (b) the interest in not being subjected to those conditions was created by BOP regulations setting forth mandatory procedures to be followed whenever a prisoner was subjected to segregated housing.[18] *Id.* at 80-81.

As in *Tellier*, plaintiffs here have satisfied both requirements for establishing a protectable liberty interest. First, the highly restrictive ADMAX SHU conditions are "atypical and significant" in comparison to the conditions faced by prisoners in the general population. *See id.* at 80 (where plaintiff has alleged confinement "under conditions that differ markedly from those in the general population, . . . we cannot conclude as a matter of law that this confinement was not 'atypical and significant.'"). Second, the government "has created a liberty interest by statute

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[17] Tellier alleged that the MCC conditions to which he was subjected to included: being confined to his cell for 23 hours per day (as opposed to six or seven hours per day for inmates in the general population), less access to the telephone, showers, recreation area and law library than general population inmates, and being handcuffed whenever removed from the cell. 280 F. 3d at 74.

[18] The initial decision to place a prisoner in a SHU is discretionary under BOP regulations, and thus there is no protected liberty interest associated with that decision. *Tellier*, 280 F.3d at 82. To the extent that plaintiffs here are alleging a denial of due process based upon their initial assignment to the ADMAX SHU, that portion of the claim is dismissed *See id.*

or regulation." *Id.* at 81. BOP regulations, codified at 28 CFR § 514.22, require individualized determinations concerning the appropriateness of continued segregation.[19] *See id.* at 83 (§ 541.22 contains mandatory language that gives rise to a state-created right that requires a factual determination of the nature of confinement). The regulations also set forth the bases for administrative detention:

> Administrative detention is to be used only for short periods of time except where an inmate needs long-term protection (see § 541.23), or where there are exceptional circumstances, ordinarily tied to security or complex investigative concerns. An inmate may be kept in administrative detention for longer term protection only if the need for such protection is documented by the SRO. Provided institutional security is not compromised, the inmate shall receive at each formal review a written copy of the SRO's decision and the basis for this finding. The SRO shall release an inmate from administrative detention when reasons for placement cease to exist.

28 CFR§ 514.22(c).

I reject Hawk Sawyer's argument that the statute does not create a protectable interest because

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[19] 28 CFR § 514.22(c) provides in part that: "[T]he Segregation Review Official will review the status of inmates housed in administrative detention. The SRO . . . shall hold a hearing and formally review the status of each inmate's placement in administrative detention, . . . and shall hold a hearing and review these cases formally at least every 30 days. The inmate appears before the SRO at the hearing unless the inmate waives the right to appear."

§ 541.22 is "designed to allow continued segregation, with fewer procedural protections, for a continuing complex investigation and/or security concerns." Hawk Sawyer Br. at. 12. While administrative detention may be used in the context of a complex investigation, the regulations do not suggest that under such circumstances an inmate may be denied all process while confined under highly restrictive conditions for over ten months.

In addition, defendants assert that administrative segregation was proper to protect plaintiffs from assault in the general population. Such an assertion does not, however, eliminate an inmate's right to due process. *See* 28 C.F.R. § 541.23(b) ("Inmates who are placed in administrative detention for protection, but not at their own request . . . are entitled to a hearing, no later than seven days from the time of their admission.").

Defendants further argue that the context of plaintiffs' detention provided legitimate rationales for not following BOP procedures. Ashcroft argues that the post-September 11 context extinguishes any rights otherwise conferred by § 541.22: "Regulations written in peacetime cannot circumscribe the government's discretion at a time of national emergency from foreign threats." Ashcroft Mem. at 15. This proposition, which suggests that, as a matter of law, constitutional and statutory rights must be suspended during times of crisis, is supported neither by statute nor the Constitution. *Cf. Hamdi*, 124 S. Ct. at 2648 ("It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.")

(citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164-65 (1963) ("The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with guarantees which, it is feared, will inhibit government action.")).

In addition, Ashcroft asserts that: (1) "high interest" detainees presented unprecedented security concerns; (2) "persons connected with terrorist activities . . . could provide Al Qaeda essential information about the scope of the government's investigation that could be gleaned simply from the identity of those detained and those who had not been found," and (3) disclosing information underlying the FBI's investigation to plaintiffs during hearings could compromise the FBI's investigation. *See* Ashcroft Br. at 12-13. These arguments may eventually prove persuasive. As discussed below, however, the inquiry into what actions defendants took and the reasonableness of those actions in the aftermath of the September 11 attacks is not one that can be made on a motion to dismiss.

(ii) Whether Plaintiffs' Right Was Clearly Established

Defendants argue that even if the complaint states a due process violation, they are entitled to qualified immunity because the right was not defined with reasonable specificity at the time the challenged actions were taken.

There is little dispute that the right to due process for a detainee held in administrative detention was clearly established as of September 10, 2001. In

November 2000, the Second Circuit held in *Tellier* that under BOP regulations, an inmate's right to process when held in atypically restrictive detention was clearly established, and that "it [was] simply unreasonable for any official to believe" that § 541.22 permitted a detainee to be kept in the SHU for 514 days without a hearing. *Id.* at 85; *see also Wright v. Smith*, 21 F.3d 496, 500 (2d Cir. 1994) ("prison officials [could not] doubt that they have acted unconstitutionally where confinement . . . continued, without a hearing, for 67 days.").

The September 11 attacks placed an enormous burden on law enforcement and created unprecedented challenges for policy makers and their subordinates. *See generally* the April 2003 OIG Report. These events affected both the contours of detainees' due process rights and the objective reasonableness of the defendants' actions. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.") (internal quotation omitted); *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) ("terrorism or other special circumstances" may provide special arguments for preventive detention and for "heightened deference to the judgments of the political branches with respect to matters of national security"). I reject, however, the argument that the post-September 11 context wholly extinguished, as a matter of law, a pretrial detainee's due process rights for almost a year while subjected to highly restrictive confinement because he had been flagged as "of interest" to the government's ongoing investigation.

Plaintiffs are not complaining of a brief deprivation of process in the immediate aftermath of September 11, but one that continued for more than 8 months in

Iqbal's case and nearly 11 months in Elmaghraby's. Indeed, Judge Glasser stated in February 2002 (approximately four months after Elmaghraby entered the ADMAX SHU) that "it appears that [Elmaghraby's] constitutional rights have been violated as to being housed in a special unit at MDC." *See USA v. Elmaghraby*, Docket No. 01-cr-1175, Docket Entry No. 42 (February 12, 2002 status conference entry).

(iii) Objective Reasonableness of Defendants' Acts

Defendants argue that they acted reasonably under the circumstances, and thus are entitled to qualified immunity. Generally, the question whether a defendant acted reasonably is a factual inquiry which is not amenable to resolution at the motion to dismiss stage. *See e.g., Johnson v. Meachum*, 839 F. Supp. 953, 958 (D. Conn. 1993) (Cabranes, C.J.) ("Whether the defendants can establish that their alleged conduct was nevertheless 'objectively reasonable' is a question which has its principal focus on the particular facts of the case," and thus resolution is inappropriate on a motion to dismiss where a court has no factual record before it.) (internal quotation omitted).

Here, there are factual disputes concerning the nature of the defendants' actions and the need for those actions in light of the investigative and security concerns at the time. Indeed, as discussed below, some defendants dispute that they were personally involved in the alleged deprivation of process at all. In these circumstances, the objective reasonableness of defendants' actions is a question that, in my view, is properly addressed only on a motion for summary judgment. *See McKenna*, 386 F.3d at 436.

(iv) Personal Involvement

Defendants argue that the allegations of their personal involvement are too conclusory to defeat their claims of qualified immunity. For the reasons discussed above concerning the substantive due process claims, plaintiffs have sufficiently alleged the personal involvement of the Wardens. Whether they have alleged sufficient facts concerning Ashcroft, the FBI Defendants or the BOP defendants presents a closer question.

Generally, the assertion that high-level executive branch members created an unconstitutional policy, without more, would be insufficient to state a claim. *See Nuclear Transp. & Storage, Inc. v. United States*, 890 F.2d 1348, 1355 (6th Cir. 1989) ("If a mere assertion that a former cabinet officer and two other officials acted to implement, approve, carry out, and otherwise facilitate alleged unlawful policies were sufficient to state a claim, any suit against a federal agency could be turned into a *Bivens* action by adding a claim for damages against the agency head and could needlessly subject him to the burdens of discovery and trial.") (internal quotation omitted) (footnote omitted). Here, however, the post-September 11 context provides support for plaintiffs' assertions that defendants were involved in creating and/or implementing the detention policy under which plaintiffs were confined without due process. *See generally* the April 2003 OIG Report.[20] In

[20] The April 2003 OIG report, which discusses the detention of aliens held on immigration violations after September 11, 2001, suggests the involvement of Ashcroft, the FBI Defendants, and the BOP Defendants in creating or implementing a policy under which plaintiffs were confined in restrictive conditions until cleared by the FBI from involvement in terrorist activities. *See, e.g.*, 37-38 (Stuart

addition, plaintiffs have alleged that defendants were aware of the atypically restrictive conditions of their lengthy confinement. *See Richardson*, 347 F.3d at 435 (supervisory liability under *Bivens* may be shown by "creation of a policy or custom that sanctioned conduct amounting to a constitutional violation, or allowing such a policy or custom to continue," or by the "failure to act on information indicating that unconstitutional acts were occurring.").

Levey, an Associate Deputy Attorney General, stated that "the idea of detaining September 11 detainees until cleared by the FBI was 'not up for debate.' He said he was not sure where the policy originated, but thought the policy came from 'at least' the Attorney General."), 39 (Daniel Levin, Counselor to the Attorney General, "described a 'continuous meeting' for the first few months after the terrorist attacks involving the Attorney General, Deputy Attorney General, FBI Director, and [then Assistant Attorney General Michael] Chertoff, and said he was sure that the issue of holding aliens until they were cleared was discussed."); 112 ("MDC officials placed all incoming September 11 detainees in the ADMAX SHU without conducting the routine individualized assessment. BOP Director Kathy Hawk Sawyer told the OIG that this designation resulted from the FBI's assessment and was not the BOP's 'call.'"); 113 ("Rardin . . . directed wardens in his region not to release inmates classified by the BOP as 'terrorist related' from restrictive detention in SHUs until further notice."); 116 ("Cooksey's October 1, 2001 memorandum . . . directed all BOP staff, including staff at the MDC, to continue holding September 11 detainees in the most restrictive conditions of confinement possible" until cleared by the FBI); 42, 49, 60 (mentioning Rolince and Maxwell's roles in the clearance process) and 69-71 (criticizing the pace of the FBI clearance process, the "indiscriminate and haphazard manner in which the labels of 'high interest,' 'of interest,' or 'of undetermined interest' were applied to many aliens who had no connection to terrorism," and explaining that the delays in clearing detainees had "enormous ramifications" for those detainees).

In addition, some of the defendants, in disclaiming responsibility, suggest that other defendants (who also disclaim responsibility) were personally involved. Ashcroft states, for example, that the MDC officials were not responsible: "BOP's decision to place detainees in administrative segregation under § 541.22(a) until cleared by the FBI was driven by national security and foreign threat concerns which wardens and prison officials were in no position to second guess." Br. at. 13. Rolince argues that it was the BOP's decision, and not the FBI's, to detain plaintiffs in the ADMAX SHU, and there are "no nonconclusory factual allegations that Rolince. . . was personally aware that the BOP relied upon the FBI clearance process in designating plaintiffs to more restrictive housing units within the MDC." Rolince Br. at 4-5. For their part, the BOP defendants contend that they were not responsible, either. Cooksey states, for example, that the MDC defendants exercised independent judgment that "breaks the chain of causation" between the alleged deprivations and his actions. Cooksey Br. at 10.[21] *See also* fn. 20, *supra*.

Plaintiffs should not be penalized for failing to assert more facts where, as here, the extent of defendants' involvement is peculiarly within their knowledge. *See Gomez*, 446 U.S. at 641. Plaintiffs have alleged sufficient facts to warrant discovery as to the defendants' involvement, if any, in a policy that subjected plaintiffs to lengthy detention in

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[21] As discussed in footnote 2, "the BOP Defendants" is used here to refer to the defendants who were upper-level managers of that agency (Hawk Sawyer, Cooksey and Rardin), as distinct from the facility-based defendants (the Wardens and the MDC Defendants).

highly restrictive conditions while being deprived of any process for challenging that detention.

(v) Discovery

The issue of qualified immunity should be addressed at the earliest appropriate stage. Where, as here, there are factual disputes that bear on the availability of the defense, discovery may be structured accordingly. *See Crawford-El*, 523 U.S. at 599-600. Rule 26 of the Federal Rules of Civil Procedure "vests the trial judge with broad discretion to tailor discover narrowly and dictate the sequence of discovery." *Id.* The personal involvement, if any, of the non-MDC defendants should be the subject of the initial stage of discovery. Accordingly, discovery concerning Ashcroft, the FBI Defendants (Mueller, Maxwell, and Rolince), and the BOP Defendants (Sawyer, Cooksey, and Rardin) will be generally limited to inquiries into their involvement in the alleged denials of due process. Appropriate topics will include whether the individual defendant participated in the creation and implementation of the policy or policies under which plaintiffs were detained, whether he or she had knowledge of the conditions under which plaintiffs were detained, and the defendant's involvement in or knowledge of the clearance process and the alleged bypassing of BOP procedures for challenging administrative segregation of pretrial detainees. Any dispute about the precise form(s) and scope of discovery shall be resolved by Judge Gold. Once he determines that discovery related to the issue is completed, defendants may file a properly supported motion for summary judgment.

2. Excessive Force (Claims 3 and 4)

Plaintiffs allege that they were physically abused by MDC officers, and that Warden Hasty, among others, failed to take reasonable measures to prevent or remedy this abuse in violation of the Fifth and Eighth Amendments. For the reasons discussed above in connection with plaintiffs' due process claims, I reject Hasty's argument that plaintiffs do not adequately allege his personal involvement in the alleged deprivations of plaintiffs' rights.

Hasty's motion to dismiss claims 3 and 4 is denied.

3. Interference with Right to Counsel (Claim 5)

Plaintiffs allege that Warden Hasty, among others, interfered with plaintiffs' right to counsel in violation of the Sixth Amendment. The unreasonable interference with an accused person's ability to consult counsel violates the Sixth Amendment. *Benjamin v. Fraser*, 264 F.3d 175, 185 (2d Cir. 2001). The right to counsel attaches "at or after the initiation of adversary judicial proceedings," whether by way of "indictment, information, or arraignment." *See Kirby v. Illinois*, 406 U.S. 682, 689 (1972). In evaluating whether a pretrial detainee's right to counsel was impaired, a court must determine whether the restrictions imposed unjustifiably obstructed the right of access to counsel or to the courts "in the light of the central objective of prison administration, safeguarding institutional security." *Benjamin*, 264 F.3d at 87 (internal quotation marks omitted).

Plaintiffs allege that while detained in the ADMAX SHU, MDC defendants substantially interfered with plaintiffs' ability to communicate with counsel by, among other things, preventing Elmaghraby from speaking over the telephone with his attorney for almost two months; subsequently disconnecting the

phone when plaintiffs complained about the conditions of their confinement; videotaping Elmaghraby's meetings with his attorney; ransacking Elmaghraby's cell while he met with his attorney; subjecting Elmaghraby to strip searches after non-contact visits with his attorney; preventing Iqbal from meeting with his attorney by falsely telling the attorney that Iqbal had been transferred out of the MDC; and routinely delaying Iqbal's receipt of legal mail. Plaintiffs allege that this interference with counsel was pursuant to a discriminatory policy, and that Hasty and other defendants knew of this interference and did nothing to remedy it.

Hasty contends that plaintiffs' claim fails because they did not state in their complaint that adversarial judicial pleadings had been initiated such that the right to counsel would attach. Hasty contends that by leaving this critical fact out of their complaint, plaintiffs have "sandbagged" Hasty, who had apparently been operating under the assumption that plaintiffs were "held in mere administrative detention until their release." Hasty Br. at 9. Plaintiffs assert that this Court may take judicial notice of Elmaghraby and Iqbal's arraignment dates (October 1, 2001 and November 5, 2001 respectively).

While the complaint could have been more transparent regarding plaintiffs' status as pretrial detainees facing criminal charges, it states that plaintiffs were arrested, held in the MDC after their arrest, transported to court on numerous occasions, and interfered with when they sought to communicate with their "criminal defense" attorneys. Such statements were sufficient to alert Hasty to the allegation that plaintiffs were not being held in mere

administrative detention. Hasty's motion to dismiss this claim is denied.

4. Denial of Medical Treatment (Claims 6 and 7)

Plaintiffs allege that they were denied adequate medical treatment in violation of the Fifth and Eighth Amendments. Defendant Nina Lorenzo, a physician's assistant at the MDC while plaintiffs were confined there, contends that (1) plaintiffs fail to state a claim; and (2) she is entitled to qualified immunity.

To state a cause of action under the Eighth Amendment for denial of medical care, a plaintiff must allege that a defendant has exhibited deliberate indifference to his serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).[22] The deliberate indifference standard incorporates both an "objective" prong—that the alleged deprivation be sufficiently serious—and a "subjective" prong—that the defen-

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[22] The standard for alleging a due process violation grounded in the denial of adequate health care may be less rigorous than the Eighth Amendment standard. *See Bryant v. Maffucci*, 923 F.2d 979, 983 (2d Cir. 1991) ("Although a pretrial detainee's due process rights to adequate medical treatment are at least as great as the Eighth Amendment protections available to prison inmates, the Supreme Court has left unresolved what standard applies." (citation omitted)). Courts, however, have applied the same analysis to both claims. *See Davis v. Reilly*, 324 F. Supp. 2d 361, 367 (E.D.N.Y. 2004) (regardless of the "academic distinction," standard for analyzing pretrial detainee's due process claim is same as the standard under the Eighth Amendment); *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000) (applying Eighth Amendment deliberate indifference test to pretrial detainee's claim under the Due Process Clause of the Fifth Amendment). Because I find that plaintiffs state an Eighth Amendment claim, I need not determine here whether there is a less rigorous for stating a due process claim.

dant acted with "a sufficiently culpable state of mind." *Hathaway v. Coughlin*, 37 F.3d, 63, 66 (2d Cir. 1994) ("*Hathaway I*").

a. Objective Test

There is "no settled, precise metric" for determining whether a prisoner's condition is "sufficiently serious" such that liability under the Eighth Amendment may attach. *See Brock v. Wright*, 315 F.3d 158, 162 (2d Cir. 2003). Factors courts consider include whether a reasonable doctor would perceive the medical need in question as worthy of treatment; whether the condition significantly affects daily activities; and whether the condition results in chronic and substantial pain. *Id.*

Plaintiffs allege that (1) after Elmaghraby was pushed into a hard surface and broke his teeth, Lorenzo provided Elmaghraby with antibiotics, but those antibiotics were confiscated by Lieutenant Ortiz upon Elmaghraby's return to the ADMAX SHU; (2) after Lorenzo misdiagnosed Elmaghraby's hypothyroidism as asthma, the condition worsened, and Elmaghraby had to undergo surgery; and (3) after a severe beating by MDC officers, Iqbal requested medical assistance from Lorenzo, but she was told by Shacks, the Unit Manager, to leave the ADMAX SHU without providing medical assistance; Iqbal did not receive any medical care for two weeks after the assault, despite suffering from excruciating pain. The latter two allegations—which are the grounds upon which plaintiffs' claims against Lorenzo are based—state a sufficiently serious condition to satisfy the objective test. *See id.* ("the Eighth Amendment forbids not only deprivations of medical care that produce physical torture and lingering death, but also less serious denials which

cause or perpetuate pain." (internal quotation omitted).

b. Subjective Test

Under the subjective test, deliberate indifference requires more than negligence: "a prison official does not act in a deliberately indifferent manner unless that official 'knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'" *Hathaway I*, 37 F.3d at 66 (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)). Defendants argue that plaintiffs allege, at most, negligence. *See Hathaway v. Coughlin*, 99 F.3d, 550, 553 (2d Cir. 1996) ("*Hathaway II*") ("'mere medical malpractice' is not tantamount to deliberate indifference"). In particular, defendants assert that because Lorenzo made some efforts to treat plaintiffs (i.e., prescribing antibiotics and (erroneously) asthma medicine; and reporting to the ADMAX SHU to provide medical services to Iqbal), the allegations demonstrate direct attention to plaintiffs' needs which negate a possible finding of indifference. *See McGann v. Coombe*, 1997 WL 88719, *2 (E.D.N.Y. 1997) (prescription of improper gout medicine shows attention and not indifference to prisoner's needs). In addition, defendants argue that because plaintiffs allege that Shacks instructed Lorenzo to leave the ADMAX SHU without providing medical assistance to Iqbal, the claim must fail unless plaintiffs' can demonstrate a duty on Lorenzo's part to disregard or override Shacks's directions.

As demonstrated by virtually all of the cases cited by Lorenzo, determining whether her conduct is actionable will require some discovery. *See, e.g.,*

Richardson, 347 F.3d 431 (deciding issue on summary judgment); *Hernandez v. Keane*, 341 F.3d 137 (2d Cir. 2003) (affirming grant of judgment as a matter of law after jury trial); *see also Phelps v. Kapnolas*, 308 F.3d 180, 186 (2d Cir. 2002) (allegation that prison officials knew that diet was inadequate and likely to inflict pain and suffering sufficiently pleads the subjective element of the deliberate indifference test); *cf.* Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other conditions of mind of a person may be averred generally."). Plaintiffs' allegations that Lorenzo was deliberately indifferent when she misdiagnosed Elmaghraby and failed to treat Iqbal (albeit after being instructed not to provide treatment at the ADMAX SHU) are sufficient to state a claim.

The deliberate indifference standard for a prisoner's Eighth Amendment claims was clearly established during the period of plaintiffs' confinement at the MDC in 2001 and 2002. *See Estelle*, 429 U.S. at 106. Lorenzo asserts that plaintiffs have not shown "that she should reasonably have known that her conduct fell short of meeting her legal duties" under that standard, and thus she is entitled to qualified immunity. Reply Br. at 6. Although Lorenzo may ultimately prevail on that ground and others as well, it is too early to make the determination. What Lorenzo knew; whether she in fact made a misdiagnosis; if so, whether it was mere negligence; whether she was bound to follow Shacks's direction; and whether she acted reasonably under the circumstances are among the questions that cannot be resolved at this early stage. Lorenzo's motion to dismiss Claims Six and Seven is therefore denied.

5. Unreasonable Searches (Claim 9)

Plaintiffs allege that they were subjected to unreasonable strip and body-cavity searches in violation of the Fourth Amendment. Specifically, they allege that there was a policy under which (1) they were subjected to daily strip and body-cavity searches for no legitimate penological reason and without reasonable suspicion; and (2) they were searched multiple times whenever transported to court or the medical department, despite remaining in continuous custody from one search to the next. They further allege that Hawk Sawyer, Hasty, and Zenk were either instrumental in establishing the search policy or, knowing that the searches were being conducted in an unconstitutional manner, failed to prevent or remedy the practice.

Defendants contend that plaintiffs fail to state a violation of a clearly established right because the searches at issue served the legitimate goal of ensuring that detainees were not in possession of dangerous or unlawful contraband. They further assert that plaintiffs fail to sufficiently allege their personal involvement.

a. The Legal Standard

The Fourth Amendment prohibits "unreasonable" searches, "a somewhat amorphous standard whose meaning varies with the context in which a search occurs and the circumstances of the search." *N.G. v. Connecticut*, 382 F. 3d 225, 230 (2d Cir. 2004). The Supreme Court has held that a policy of subjecting pretrial detainees to strip searches after contact visits did not violate the Fourth Amendment, *see Bell*, 441 U.S. at 546, but "*Bell* did not 'read out of the Constitution the provision of general application that

a search be justified as reasonable under the circumstances.'" *Shain v. Ellison*, 273 F.3d 56, 64 (2d Cir. 2001) (quoting *Weber v. Dell*, 804 F.2d 796, 800 (2d Cir. 1986); *see also Cøvino v. Patrissi*, 967 F.2d 73, 78 (2d Cir. 1992) (pretrial detainees retain a limited right to bodily privacy, and thus have the right to be free from bodily searches that are unreasonable under the circumstances of their confinement); *cf. N.G. v. Connecticut*, 382 F. 3d at 238 (Sotomayer, J., dissenting in part) ("Our caselaw consistently has recognized the severely intrusive nature of strip searches and placed strict limits on their use.").

The Second Circuit has evaluated the constitutionality of strip and body-cavity searches under two different tests: the *Covino/Turner* reasonable relation test and the *Shain/Weber* reasonable suspicion test. Here, plaintiffs assert that *Shain/Weber* provides the applicable standard, while Hawk Sawyer contends that plaintiffs' claim should be analyzed under the *Covino/Turner* reasonable relation standard. I agree with Hawk Sawyer.

In *Covino*, the Second Circuit evaluated whether a prison regulation permitting random visual body-cavity searches of a pretrial detainee violated the Fourth Amendment by analyzing whether the regulation was "reasonably related to legitimate penological interests." 967 F.2d at 75, 78. In making such a determination, the Second Circuit applied the four-factor test set forth in *Turner v. Safley*, 482 U.S. 78 (1987): "(i) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (ii) whether there are alternative means of exercising the right in question that remain open to

prison inmates; (iii) whether accommodation of the asserted constitutional right will have an unreasonable impact upon guards and other inmates . . .; and (iv) whether there are reasonable alternatives available to the prison authorities." *Covino*, 967 F.2d at 78-79 (citing *Turner*, 482 U.S. at 89-90). The Covino Court held that a random visual body-cavity search policy was not an unreasonable regulation, and affirmed the denial of a motion for a preliminary injunction. *Id.* at 80. The Court noted, though, that plaintiff's claim had not been dismissed because "it was not clear from the testimony at the preliminary injunction hearing whether the search procedure was being applied in a purely random manner or if the searches were intended to harass, intimidate, or punish [the inmate]". *Id.* at 80.

In *Shain*, the Second Circuit reviewed its cases on the constitutionality of searching persons charged with misdemeanors,[23] and held that, in light of those decisions, "no law enforcement officer reasonably could have believed that it was permissible to perform [a strip search on an individual arraigned on misdemeanor charges] absent individualized reasonable suspicion." *Shain*, 273 F. 3d at 59. *Shain* delineated a bright line between a prison, where convicted felons are housed, and a jail, "a place where persons awaiting trial or those convicted of mis-

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[23] Those cases are *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986) (holding that the Fourth Amendment precludes prison officials from performing strip/body-cavity searches of arrestees charged with misdemeanors absent reasonable suspicion that the arrestee is concealing contraband); *Walsh v. Franco*, 849 F.2d 66 (2d. Cir. 1988) (reaffirming *Weber*); and *Wachtler v. County of Herkimer*, 35 F.3d 77 (2d Cir. 1994) (applying *Weber* to post-arraignment strip searches of a person charged with a misdemeanor).

demeanors are confined." *Id.* at 65 (internal quotation omitted). In a prison, the appropriate test for determining the constitutionality of a search policy was the *Covino/Turner* reasonable relation test. *Id.* at 65-66. In a jail, on the other hand, the determination should be made by whether there was reasonable suspicion for the search. *Id.*

Plaintiffs argue that the MDC is the federal equivalent of a jail, and thus the clearly established applicable law is *Shain/Weber* (*Shain* was decided on October 19, 2001). I conclude, however, that plaintiffs are much more closely situated to the pretrial detainee held in prison in *Covino* than the misdemeanants and minor offenders of *Shain/Weber*. The MDC holds both pre-trial detainees and convicted criminals of all security levels. Moreover, plaintiffs were pretrial detainees who had been flagged, legitimately or not, as being "of high interest" to the post- September 11 investigation and were being held in a maximum security unit.

At the very least, it was not clearly established in the fall of 2001 that pretrial detainees held in highly restrictive detention in a federal facility could be searched only upon reasonable suspicion. *Cf. N.G. v. Connecticut*, 382 F.3d at 235 ("Perhaps the *Turner* standard applies to a state facility confining juveniles . . . awaiting trial for [conduct that would be a crime if committed by an adult.]"). There is no dispute, however, that during the period in which plaintiffs were confined in the ADMAX SHU, it was clearly established that a strip and body-cavity search policy had to be reasonably related to legitimate penological goals. *See Bell*, 441 U.S. 576; *Covino*, 967 F.2d at 76-78.

b. Reasonable Relation

Under the *Covino/Turner* reasonable relation standard, plaintiffs state a constitutional violation. Plaintiffs assert that they were subjected to a policy of serial and daily suspicionless strip and body-cavity searches, and that such a policy was unmoored from any legitimate penological interest. Plaintiffs do not dispute that there are legitimate justifications for strip or body-cavity searches—*see Bell*, 441 U.S. at 558-560 (upholding body-cavity searches after contact visits); *Covino*, 967 F.2d at 77-80 (upholding random searches)—but they allege that such justifications were not present here. *Cf. Covino*, 967 F.2d at 80 (random visual searches are constitutional, but plaintiff's claim not dismissed because it was unclear whether purportedly random search procedure was being used to harass or punish the inmate); *Hodges v. Stanley*, 712 F.2d 34, 35 (2d Cir. 1983) (second search of administrative detainee appears to be unreasonable when detainee had been under continuous escort after initial search) (citing *Bono v. Saxbe*, 620 F.2d 609, 617 (7th Cir. 1980) (*Bell* rationale does not justify strip searches after noncontact, supervised visits absent a showing that there is some risk that contraband will be smuggled into the prison)). In sum, the success or failure of these claims as well will turn on the particular facts of the case.

c. Personal Involvement

Hawk Sawyer, Hasty, and Zenk all seek dismissal based on an asserted failure to allege their personal involvement in the allegedly unreasonable searches. Hasty argues that plaintiffs do not allege that he participated in or witnessed any challenged search. Zenk contends that the specific searches alleged by

plaintiffs occurred prior to April 22, 2002, the day Zenk became warden, and Hawk Sawyer argues that plaintiffs have failed to allege that she participated in, or was even informed of, the alleged unconstitutional searches.

Plaintiffs have sufficiently alleged the personal involvement of the Wardens. *See McKenna*, 386 F.3d at 433-34. Zenk's claim that plaintiff's allegations pre-date his involvement is defeated by my obligation to draw all factual inferences from the facts alleged in plaintiffs' favor. Such a claim, if accurate, can be resolved at the Rule 56 stage after discovery has been completed.

I find, however, that plaintiffs' have failed to adequately allege the involvement of Hawk Sawyer in the challenged searches. To be sure, Hawk Sawyer's (and the BOP Defendants')[24] involvement is alleged in conclusory fashion at two locations in the complaint. *See* ¶¶ 134, 142. But those boilerplate allegations conflict with the specific allegation in ¶ 58 that "[t]he procedures for handling detainees on the ADMAX SHU was developed by [certain MDC personnel] at the request of Defendant Hasty." Moreover, as compared to the alleged policy to deprive detainees of their due process rights, the strip search allegations against Hawk Sawyer draw less support from the context in which defendants'

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[24] It is not clear from the complaint whether plaintiffs intended to assert this claim against Cooksey and Rardin, the other higher-level BOP Defendants. Plaintiffs have not alleged grounds to support a claim that Cooksey and Rardin were personally involved in the unreasonable search policy. To the extent that plaintiffs intended to assert such claims, those claims are dismissed.

conduct occurred.[25] Accordingly, Hawk Sawyer's motion to dismiss the claim is granted.

6. Interference with Religious Practices (Claim 10)

Plaintiffs allege that, as a matter of policy, MDC officers interfered with their religious practices in violation of the Free Exercise Clause of the First Amendment. Specifically, plaintiffs allege that MDC officers banged on their cells while they were praying, routinely confiscated their copies of the Koran, and refused to permit plaintiffs to participate in Friday prayer services with other Muslims. Plaintiffs allege that the Wardens, among others, were instrumental in the implementation of such a policy, or that they knew (or should have known) that their subordinates were unlawfully interfering with plaintiffs' religious practices but did nothing to curtail such actions. The Wardens assert, among other things, that plaintiffs should have complained through administrative channels, and that plaintiffs have failed to sufficiently allege their personal involvement. In addition, Hasty asserts that he reasonably deferred to the MDC chaplain on issues concerning the religious accommodation of inmates at the ADMAX SHU.

While inmates "clearly retain protections afforded by the First Amendment," there are limitations based on institutional security, among other things. *O'Lone*

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[25] See Office of the Inspector General, *Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York* 33-35 (December 2003) (discussing strip searches conducted by MDC staff, and stating that it did not appear that the MDC issued written policies for when detainees were to be strip searched, and to the extent there may have been a policy, it was applied inconsistently).

v. Shabazz, 482 U.S. 342, 348-49 (1987). A challenge to a prison policy on those grounds requires the court to determine whether the policy is reasonably related to legitimate penological interests. *Id.* at 349. In *O'Lone*, the Court held that regulations that may prevent Muslims from attending Jumu'ah (a weekly service held every Friday afternoon) were reasonably related to a legitimate concern for institutional safety.[26] *Id.* at 345, 350-51, 53.

Here, plaintiffs have stated a claim under the First Amendment. Whether the policy or policies that allegedly impinged on their rights existed, and if so whether they were reasonably related to legitimate objectives are not questions that can be resolved on a motion to dismiss. *Cf. O'Lone*, 482 U.S. at 350-353 (the Supreme Court's determination that regulations were reasonably related to legitimate objectives was grounded in testimony by, among others, prison officials at a two-day hearing before the district court). Similarly, whether Hasty deferred to the MDC chaplain, and whether such deference was reasonable, are questions for summary judgment or trial.

Plaintiffs have also sufficiently alleged the Wardens' personal involvement. They need not allege that the Wardens themselves banged on cells or confiscated Korans to state a claim of supervisory liability. *Cf. Noguera v. Hasty*, 2001 WL 243535, at *3 (S.D.N.Y. March 12, 2001) (where "the parties dispute almost every fact relevant to the qualified immunity determination, particularly the extent of

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[26] The challenged regulations in *O'Lone* concerned the prison's policies of assigning inmates to jobs outside the main building and preventing those inmates from returning to the main building during the day (where the Jumu'ah service was held). 482 U.S. at 355-47.

the information provided to [the supervisory defendants] . . . and the response of those officers to the information provided," summary judgment is not warranted). Plaintiffs have alleged that the Wardens had knowledge of the violations and allowed them to continue; their disavowal of such knowledge does not warrant dismissal of these claims.

7. Racial and Religious Discrimination (Claims 11 and 12)

Plaintiffs allege that harsher conditions of confinement were imposed upon them because of their religious beliefs and race, in violation of the First Amendment and the Equal Protection Clause of the Fifth Amendment, respectively. They claim that defendants created or implemented such a discriminatory policy, or failed to remedy the policy once it was imposed. Defendants assert that plaintiffs fail to state a constitutional violation and have not sufficiently alleged their personal involvement

"No person can be punished for entertaining or professing religious beliefs or disbeliefs." *People of State of Ill. ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign County, Ill.*, 333 U.S. 203, 210 (1948) (internal quotation omitted). While the protections afforded by the First Amendment may be limited in the prison setting for legitimate penological reasons, *see O'Lone v. Shabazz*, 482 U.S. at 348-49, a prisoner may not be punished because of his religious beliefs. *See, e.g., Cooper v. Pate*, 378 U.S. 546, 546 (1964) (prisoner's denial of privileges because of religious beliefs states a § 1983 claim) (citing *Pierce v. La Vallee*, 293 F.2d 233, 235 (2d Cir. 1961) (prisoner's allegation of punishment based upon religious beliefs states a First Amendment claim)); *Salahuddin v. Dalsheim*, 1996 WL 384898, at

*12 (S.D.N.Y. July 9, 1996) (denying motion to dismiss where inmate alleged that his transfer to a new facility violated his free exercise rights). Nor can a prisoner be punished because of his race. *See, e.g., Turner*, 482 U.S. at 84 (prisoners protected against invidious racial discrimination by the Equal Protection Clause); *cf. Johnson v. California*, 125 S. Ct. 1141, 1146 (2005) ("all racial classifications" imposed by government, including those in the prison context, must be analyzed under strict scrutiny).

Defendants contend that plaintiffs cannot state an equal protection claim because they have not alleged sufficient facts to show that (1) defendants acted with discriminatory animus or (2) plaintiffs were treated differently than members of another protected class. I disagree.

Proof of racially discriminatory intent is required to establish a violation of the Equal Protection Clause. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977). Such proof is not required, however, to survive a motion to dismiss. *See Phillip v. Univ. of Rochester*, 316 F.3d 291, 298 (2d Cir. 2003) (allegation that plaintiffs were singled out for maltreatment from a group that contained non-minorities is sufficient to survive a motion to dismiss). *Arlington Heights*, which defendants rely upon, is not to the contrary. There, the Court upheld a challenged zoning decision because the respondents, after trial, had "failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision." 429 U.S. at 270. The Court elaborated on the fact-specific nature of the inquiry: "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circum-

stantial and direct evidence of intent as may be available." *Id.* at 266. Such evidence may include the "historical background of the decision" and the "specific sequence of events leading up to the challenged decision." *Id.* at 267.

Here, plaintiffs allege that they were confined under significantly harsher conditions than other pretrial detainees because of their race and religion, and not because of any evidence that they were involved in terrorist activity. I cannot conclude as a matter of law that there is no set of facts consistent with plaintiffs' allegations that could entitle them to relief.

Defendants argue that plaintiffs fail to describe how defendants' treatment of other races was different than the treatment of plaintiffs. Plaintiffs are not required, however, to lead such facts in order to proceed with their claim. *See Pyke v. Cuomo*, 258 F.3d 107, 110 (2d Cir. 2001) ("a plaintiff who . . . alleges an express racial classification . . . is not obligated to show a better treated, similarly situated group of individuals of a different race in order to establish a claim of denial of equal protection."). In any event, the allegation that plaintiffs were singled out for harsher treatment because of race and religion necessarily implies that other non-Muslim, non-Arab prisoners confined at MDC during the same period were not subjected to similarly harsh treatment. *See People United for Children, Inc. v. The City of New York*, 108 F. Supp. 2d 275, 297 n.15 (S.D.N.Y. 2000) (denying motion to dismiss equal protection claims; allegations imply that plaintiffs were treated differently).

a. Personal Involvement

Defendants argue that plaintiffs have failed to sufficiently allege their personal involvement. I agree with respect to the BOP Defendants but not with respect to Ashcroft, the FBI Defendants, or the Wardens. Plaintiffs assert that Ashcroft was the principal architect of the challenged policies (Compl. ¶ 10), and that Rolince and/or Maxwell classified them as "of high interest" because of their race, religion, or national origin. (Compl. ¶51.) In support of this assertion, plaintiffs allege that "all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks—however unrelated the arrestee was to the investigation—were immediately classified as "of interest" to the post-September 11th investigation. (Compl. ¶ 52.) Taking those allegations as true, it cannot be said that there are no set of facts on which the plaintiffs would be entitled to relief as against Ashcroft and the FBI Defendants. Though Plaintiffs assert that the BOP defendants were instrumental in the imposition of the challenged policies, they do not allege that those defendants were involved in the challenged classification. Accordingly, these claims are dismissed against the BOP Defendants. Although plaintiffs also have not alleged that the Wardens were involved in their initial classification, they have alleged that the Wardens were personally involved in imposing harsher conditions of confinement because of plaintiffs' race and religion. Such a challenge, combined with the allegations of their treatment at the MDC, is sufficient to state a claim against the Wardens and defeat the assertion of qualified immunity on a motion to dismiss.

F. Plaintiffs' Statutory Claims

1. Religious Freedom Restoration Act (Claims 13-15)

Plaintiffs allege violations of their rights under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA"). Specifically, they allege that because of their religious beliefs, they were subjected to (1) harsher conditions of confinement; (2) interference with their religious practice; and (3) physical and verbal abuse, and that these actions imposed a substantial burden on their religious exercise and belief. Defendants assert, among other things, that they are entitled to qualified immunity because it was not clearly established in October 2001 that RFRA applied to federal officials. I agree.

RFRA prohibits government[27] from "substantially burden[ing]" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court "invalidated RFRA as applied to States and their subdivisions, holding that the Act exceeded Congress' remedial

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[27] The term "government" includes "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." § 2000bb-2(1). RFRA accordingly reaches officials acting in their individual capacities *See Solomon v. Chin*, 1997 WL 160643, at *5 (S.D.N.Y. April 7, 1997) (allowing claim under RFRA to proceed against prison officers in their individual capacities).

powers under the Fourteenth Amendment." *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2118 (2005).

Plaintiffs argue that RFRA's application to federal officials was clearly established during the relevant period because (1) *Browne v. United States*, 176 F.3d 25 (2d Cir. 1999), implicitly holds that RFRA applies to federal officials; (2) other circuit courts that have considered the question post-*Boerne* have uniformly held that RFRA applies to federal officials; and (3) Congress amended RFRA post-*Boerne* (and prior to the alleged violations here) to eliminate references to state governments, and thus defendants could not have reasonably believed that RFRA did not apply to their actions. I find, however, that support for the proposition that it was clearly established in the Second Circuit that RFRA applied to federal officials during the 2001-2002 period is too tenuous to provide a basis for denying qualified immunity. *Cf. Back*, 365 F.3d at 129-130 (clearly established analysis based on whether the decisional law of the Supreme Court and the applicable circuit court supports the existence of the right in question).

Neither the Supreme Court nor the Second Circuit has directly addressed the applicability of RFRA to federal officials post-*Boerne*. *See Cutter*, 125 S.Ct. at 2118 n.2 ("RFRA, Courts of Appeals have held, remains operative as to the Federal Government and federal territories and possessions. This Court, however, has not had occasion to rule on the matter.") (citations omitted); *Browne*, 176 F.3d at 26. In *Browne*, the Second Circuit affirmed the dismissal of a claim asserting that an IRS judgment violated RFRA. *Id.* The district court had questioned RFRA's continuing constitutionality post-*Boerne*, but assumed it was constitutional for the purposes of its

decision. *See Browne v. United States*, 22 F. Supp. 2d 309, 312 (D. Vt. 1998). On appeal, the Second Circuit did not discuss RFRA's constitutionality.[28] In comparison to the thorough discussion of the question by appellate courts that have directly addressed the issue (discussed below), the *Browne* court's silence does not provide strong support for the proposition that RFRA's applicability to the federal government was clearly established. Moreover, in *Ford v. McGinnis*, 352 F.3d 582 (2d Cir. 2003), the Second Circuit stated that the Supreme Court had "invalidated" RFRA:

> While it was still good law, we dutifully applied RFRA's substantial burden test to prisoners' free exercise claims, despite the Supreme Court's suggestion in [*Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990)] that so doing puts courts in "the unacceptable business of evaluating the relative merits of differing religious claims." Now with RFRA invalidated, however, the Circuits apparently are split over whether prisoners must show a substantial burden on their religious exercise in order to maintain free exercise claims.

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[28] Following Browne, at least one district court in this circuit has noted that RFRA continues to apply to the *federal government, see Marrero v. Apfel*, 87 F. Supp. 2d 340, 348 (S.D.N.Y. 2000) (construing claim that pro se applicant was entitled to Social Security benefits on the ground that his religious faith prevents him from working a regular job as a claim under RFRA), while another district court assumed that RFRA continued to apply to the federal government where neither party challenged its continuing applicability. *United States v. Any and All Radio Station Equipment*, 93 F. Supp. 2d 414, 418 n.4 (S.D.N.Y. 2000).

352 F.3d at 592 (quoting *Smith*, 494 U.S. at 887, other citations omitted). While the holding in *Ford* concerned RFRA's applicability to the states, the Second Circuit did not temper its language to make this distinction clear.

Plaintiffs argue that all other circuit courts that have squarely addressed the issue have held that RFRA continues to apply to the federal government[29] and that even where there is no Second Circuit or Supreme Court authority directly on point, decisions of other circuits may warrant the conclusion that a right was clearly established. In fact, the Second Circuit's decisions have sent "conflicting signals" on the latter issue, *see African Trade & Information Center, Inc. v. Abromaitis*, 294 F.3d 355, 361 (2d Cir. 2002), but I need not resolve it here, as the cases plaintiffs rely on suggest that during the 2001-2002 period in question here, RFRA's applicability to the federal government was unclear. For example, in 2003, prior to its holding in *O'Bryan*, the Seventh Circuit stated only that *Boerne* had "left open the possibility" that RFRA still applied to the federal government. *See United States v. Israel*, 317 F.3d 768, 770-71 (7th Cir. 2003) (assuming RFRA's constitutionality as applied to the federal government where neither party contested it). Similarly, the Ninth Circuit explained in *Guam v. Guerrero* that it previously had "not definitively held RFRA constitutional as applied in the federal realm." 290

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[29] *See Madison v. Riter*, 355 F.3d 310, 315 (4th Cir. 2003); *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003); *Guam v. Guerrero*, 290 F.3d 1210, 1220-22 (9th Cir. 2002); *Kikumura v. Hurley*, 242 F.3d 950, 958-60 (10th Cir. 2001); *In re Young*, 141 F.3d 854, 858-863 (8th Cir. 1998).

F.3d at 1220. And *Kikumura* reversed a district court's holding that *Boerne* had rendered RFRA claims against federal prison officials unconstitutional as well. 242 F.3d at 958-60. Thus, the legal landscape in which the actions challenged in this case occurred differs markedly from that of *Varrone v. Bilotti*, 123 F.3d 75, 79 (2d Cir. 1997) (finding reasonable suspicion standard for strip searching prison visitors was clearly established where three other circuits had so held prior to the search at issue and second circuit decisions had "foreshadowed" that standard); and Weber, 804 F.2d at 803-04 (relying on eleven decisions from other circuit courts, three of which antedated questioned search, in finding law clearly established).

I find that it was not clearly established in October 2001 that RFRA applied to the federal government. Accordingly, defendants are entitled to qualified immunity and the motions to dismiss these claims are granted.

2. Conspiracy Under 42 U.S.C. § 1985(3) (Claims 16 and 17)

Plaintiffs claim that the defendants conspired to deprive them of equal protection of the laws and of equal privileges and immunities of the laws because of plaintiffs' religious beliefs, race, and national origin, in violation of 42 U.S.C. § 1985(3). Specifically, plaintiffs claim that (1) Ashcroft, Mueller, the BOP Defendants, and the Wardens, among others, agreed to subject plaintiffs to unnecessarily harsh conditions of confinement without due process; (2) the BOP Defendants and the Wardens, among others, agreed to subject plaintiffs to unnecessary and extreme strip and body-cavity

searches as a matter of policy; and (3) the Wardens and other MDC defendants agreed to substantially burden Elmaghraby's religious practice while he was housed in the ADMAX SHU. Defendants assert that (1) they are entitled to qualified immunity because it is not clearly established law in the Second Circuit that 42 U.S.C. § 1985(3) applies to suits against federal officers; and (2) plaintiffs fail to sufficiently allege facts establishing their personal involvement in the alleged deprivations.

42 U.S.C. § 1985(3) reads, in pertinent part:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

To make out a violation of 42 U.S.C. § 1985(3), a plaintiff "must allege and prove four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of

any right or privilege of a citizen of the United States." *United Brotherhood of Carpenters v. Scott*, 463 U.S. 825, 828-29 (1983). With respect to the second element, a plaintiff must show that the conspiracy was motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." *Id.* (internal quotation omitted); *see also Posr v. Court Officer Shield No. 207*, 180 F.3d 409, 419 (2d Cir. 1999); *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993).

a. Clearly Established Law

Defendants argue that the Second Circuit has never recognized that 1985(3) is available for suits against federal officials sued in their individual capacities. In *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), the Second Circuit held that the United States Attorney General had absolute immunity from civil actions for malicious prosecution. 177 F.2d at 581. In reaching its decision, the court implied that § 1985(3) required state action. *Id.* In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the Supreme Court held that § 1985(3) did not contain a state action limitation. 403 U. S. at 101. The Court stated that instead, a plaintiff was required to establish "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.* at 102.

Like other district courts in this circuit, I conclude that the "holding in *Griffin* necessarily extends section 1985(3) to reach racially motivated conspiracies involving federal officers." *Li v. Canarozzi*, 1997 WL 40979, at *4 (S.D.N.Y. Feb. 3, 1997). As Judge Sand reasoned:

> Although the Second Circuit has yet to adopt this broader reading of 1985(3), its most recent authority to the contrary, *Gregoire v. Biddle*, preceded not only the Supreme Court's decision in *Griffin* but also the evolution of the doctrine of qualified immunity. . . . The *Gregoire* Court's holding followed a discussion of the danger of allowing federal officials to be sued for conduct in the course of their official duties. Many of those concerns are now addressed by the various immunities available to federal officials, including those arising pursuant to the FTCA and qualified immunity.

1997 WL 40979, at *3 (citations omitted); *see also Moriani v. Hunter*, 462 F. Supp. 353, 356 (S.D.N.Y. 1978) ("Unless there is a rationale, unknown to the past cases, for holding that federal officers are not 'persons' under § 1985(3), there is no longer any reason to exclude from coverage federal officers acting under color of federal law."); *Hobson v. Wilson*, 737 F.2d 1, 44 (D.C. Cir. 1984) (*Gregoire* effectively overruled by *Griffin*; applying § 1985(3) to FBI agents); *Jafree v. Barber*, 689 F.2d 640, 643 (7th Cir. 1982) (§ 1985(3) action available against federal officials). I conclude that, after *Griffin*, it was clearly established that § 1985(3) applied to federal officers.

b. Personal Involvement

To survive a motion to dismiss on a conspiracy claim, a plaintiff "must provide some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end." *Webb v. Gourd*, 340 F.3d 105, 110 (2d Cir. 2003) (internal quotation omitted). Plaintiffs are also required to allege "with at least some degree of particularity, overt acts which

defendants engaged in which were reasonably related to the promotion of the claimed conspiracy." *Thomas v. Roach*, 165 F.3d 137, 147 (2d Cir. 1999).

Plaintiffs assert that they have met these standards by alleging that various defendants agreed to deprive plaintiffs of their rights, and by alleging that defendants adopted and implemented policies which deprived plaintiffs of these rights. As discussed in connection with plaintiffs' Fourth Amendment claim, plaintiffs have not sufficiently alleged the personal involvement of the BOP Defendants in subjecting them to "unnecessary and extreme strip and body-cavity searches," and the BOP Defendants' motions are granted as to that alleged agreement. In all other respects, defendants motions to dismiss the § 1985 claims are denied. As discussed above, I am mindful of the fact that cabinet-level and other high-ranking government officials may not properly be burdened by litigation based on conclusory allegations that they are responsible (through policy-making or failing to supervise) the alleged torts of federal employees. Nevertheless, I am not convinced, given the particularized allegations in paragraphs 249-51 and the virtually unique context in which the alleged actions occurred, that there is no set of facts consistent with those allegations on which plaintiffs will be entitled to relief against the defendants.

3. Alien Tort Statute (Claim 21)

Plaintiffs allege that the moving defendants engaged in acts which "had the intent and the effect of grossly humiliating Plaintiffs, forcing them to act against their will and conscience, inciting fear and anguish, and breaking their physical and moral resistance." Compl. ¶ 267. Plaintiffs assert that these acts constituted cruel, inhuman, or degrading

treatment in violation of international law, and bring a claim under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS").

The United States moves to be substituted for the individual defendants pursuant to the Liability Reform Act, 28 U.S.C. § 2679, and for dismissal of the ATS claim on the ground of sovereign immunity. In addition, defendants assert that they are entitled to qualified immunity because, among other things, it was not clearly established during the relevant period what acts fall within the ambit of the ATS.

Plaintiffs concede that if the motion for substitution is granted, then the ATS claims should be dismissed because the United States has not waived its sovereign immunity from claims for money damages brought pursuant to the ATS. *See* Pl.'s Opp'n. Mem. at 5.

a. Liability Reform Act

The Liability Reform Act provides that for civil actions based on the wrongful conduct of federal employees acting within the scope of their employment, the only available remedy is a claim under the Federal Tort Claims Act against the government itself. 28 U.S.C. § 2679(b). There are two exceptions to this exclusive remedy provision. It does not apply to actions against an employee of the government "brought for a violation of the Constitution of the United States, or . . . for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(A), (B).

Although the question is not free from doubt, I find that because it is "international law cum common law" *see Sosa v. Alvarez-Machain*, 124 S.Ct. 2739,

2754 (2004), that defines the claims for which the ATS provides jurisdiction, the statute does not fall into the § 2679(b)(2)(B) exception to the Liability Reform Act.

The ATS reads in its entirety as follows: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The statute, although "in terms only jurisdictional," enables "federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa*, 124 S.Ct. at 2754. In *Sosa*, the Court concluded that although the ATS did not create new causes of action, "[t]he jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." *Id.* at 2761.

Plaintiffs argue that because the ATS authorizes a limited category of actions, it falls within the § 2672(b)(2)(B) exception for violations of a statute. The ATS does not, however, impose any duties or obligations on an individual. *See United States v. Smith*, 499 U.S. 160, 174 (1991) (holding that the §2679(b)(2)(B) exception did not apply to the Gonzalez Act, 10 U.S.C. § 1089, which immunized federal employees from individual medical malpractice suits). In *Smith*, the Court concluded that the §2679(b)(2)(B) exception did not apply because the Gonzalez Act itself could not be violated: "Nothing in the Gonzalez Act imposes any obligations or duties of care upon military physicians," and therefore "a physician allegedly committing malpractice under

state or foreign law does not 'violate' the Gonzalez Act." 499 U.S. at 174. Similarly, the ATS itself cannot be "violated." *See Bancoult v. McNamara*, 370 F. Supp. 2d 1, 10 (D.D.C. 2004) ("The plain language of AT[S], however, does not confer rights nor does it impose obligations or duties that, if violated, would trigger the § 2672(b)(2)(B) exception. . . . A claim brought pursuant to the AT[S], therefore, is based on violation of rights conferred under international law, not the AT[S]."); *Alvarez-Machain v. United States*, 331 F.3d 604, 631-32 (9th Cir. 2003) (en banc), *reversed on other grounds sub nom., Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004); *Schneider v. Kissinger*, 310 F. Supp. 2d 251, 266-67 (D.D.C. 2004); *Bieregu v. Ashcroft*, 259 F. Supp. 2d 342, 353 (D.N.J. 2003).

Because the ATS is not a statute that itself can be violated, it does not fall within the § 2679(b)(2)(B) exception. Accordingly, the government's motion for substitution is granted. Because the United States has not waived its sovereign immunity from suits seeking money damages under international law, its motion to dismiss the ATS claim is granted. *See Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 474 (1994) (absent an express waiver of sovereign immunity, a plaintiff may not sue the United States in federal court).[30]

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[30] Because I find that the ATS does not fall within an exception to the Liability Reform Act and grant the United States' motions for substitution and dismissal of the ATS claims, I need not decide whether it was clearly established that the alleged violations of international law fell within the ambit of the ATS during the relevant period.

CONCLUSION

For the foregoing reasons, the motions to dismiss are granted in part and denied in part:

Claim 1:	The Wardens' motions to dismiss are denied.
Claim 2:	Defendants' motions to dismiss are denied.
Claim 3-4:	Hasty's motion to dismiss is denied.
Claim 5:	Hasty's motion to dismiss is denied.
Claims 6-7:	Lorenzo's motion to dismiss is denied.
Claim 8:	The Wardens' motions to dismiss are denied.
Claim 9:	The Wardens' motions to dismiss are denied. Hawk Sawyer's motion to dismiss is granted.
Claim 10:	The Wardens' motions to dismiss are denied.
Claims 11-12:	The Wardens' motions to dismiss are denied. Ashcroft and the FBI Defendants' motions to dismiss are denied. The BOP Defendants' motions to dismiss are granted.
Claims 13-15:	Defendants' motions to dismiss are granted.
Claims 16-17:	The BOP Defendants' motions to dismiss are granted with respect to the alleged agreement to sub-

ject plaintiffs to unnecessary and extreme strip and body-cavity searches. In all other respects, Defendants' motions to dismiss are denied.

Claim 21: The United States' motions for substitution and dismissal are granted. The claim is dismissed as to all defendants.

So Ordered.

JOHN GLEESON, U.S.D.J.

DATED: September 27, 2005
Brooklyn, New York

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term 2006

Docket Nos. 05-5768-cv (L), 05-5844-cv (con),
05-6379-cv (con), 05-6352-cv (con), 05-6386-cv (con),
05-6358-cv (con), 05-6388-cv (con)

JAVAID IQBAL,
Plaintiff-Appellee,

v.

DENNIS HASTY, former Warden of the Metropolitan Detention Center, MICHAEL COOKSEY, former Assistant Director for Correctional Programs of the Bureau of Prisons, JOHN ASHCROFT, former Attorney General of the United States, ROBERT MUELLER, Director of the Federal Bureau of Investigation, DAVID RARDIN, former Director of the Northeast Region of the Bureau of Prisons, MICHAEL ROLINCE, former Chief of the Federal Bureau of Investigation's International Terrorism Operations Section, Counterterrorism Division, KATHLEEN HAWK SAWYER, former Director of the Federal Bureau of Prisons, KENNETH MAXWELL, former Assistant Special Agent in Charge, New York Field Office, Federal Bureau of Investigation,
Defendants-Appellants.

Heard: October 4, 2006
Decided: June 14, 2007

Before: NEWMAN, CABRANES, and SACK, *Circuit Judges.*

Appeal from the September 27, 2005, Order of the United States District Court for the Eastern District of New York (John Gleeson, District Judge), denying in part the Defendants-Appellants' motions to dismiss the Amended Complaint on the grounds of qualified immunity. Affirmed in part, reversed in part, and remanded. Judge Cabranes concurs in the judgment and opinion of the Court and files a concurring opinion.

Michael L. Martinez, Wash., D.C. (Shari Ross Lahlou, David E. Bell, Justin P. Murphy, Matthew F. Scarlato, Crowell & Moring LLP, Wash., D.C., on the brief), for Defendant-Appellant Hasty.

Gregory G. Garre, Deputy Solicitor Gen., Dept. of Justice, Wash., D.C. (Peter D. Keisler, Asst. Atty. Gen., Gregory G. Katsas, Deputy Asst. Atty. Gen., Kannon K. Shanmugam, Asst. to the Solicitor Gen., Barbara L. Herwig, Robert M. Loeb, Dept. of Justice, Wash., D.C.; Dennis C. Barghaan, Richard W. Sponseller, Larry Lee Gregg, Asst. U.S. Attys., Alexandria, VA.; R. Craig Lawrence, Asst. U.S. Atty., Wash., D.C., on the brief), for Defendants-Appellants Ashcroft and Mueller.

Mark E. Nagle, Troutman Sanders LLP, Wash., D.C. (William E. Lawler, III, Cheryl A. Curtis, Nashiba D. Boyd, Vinson & Elkins, L.L.P., Wash., D.C.; Raymond R. Granger, New York, N.Y., on the brief), for Defendants-Appellants Sawyer, Cooksey, and Rardin.

Lauren J. Resnick, New York, N.Y. (Fernando A. Bohorquez, Jr., Baker & Hostetler, LLP, New York, N.Y.; Leslie R. Caldwell, Morgan, Lewis & Bockius

LLP, New York, N.Y., on the brief), for Defendants-Appellants Rolince and Maxwell.

Alexander A. Reinert, New York, N.Y. (Keith M. Donoghue, Elizabeth L. Koob, Joan Magoolaghan, Koob & Magoolaghan, New York, N.Y.; Haeyoung Yoon, Urban Justice Center, New York, N.Y.; Mamoni Bhattacharyya, David Ball, Weil, Gotshal & Manges LLP, New York, N.Y., on the brief), for Plaintiff-Appellee Iqbal.

(Anil Kalhan, New York, N.Y., for *amici curiae* Civil Rights Organizations in support of Plaintiff-Appellee.)

(Michael J. Wishnie, New York, N.Y., for *amici curiae* Individuals and Religious Organizations in support of Plaintiff-Appellee.)

JON O. NEWMAN, *Circuit Judge.*

These interlocutory appeals present several issues concerning the defense of qualified immunity in the aftermath of the events of 9/11. Several current and former government officials from the Department of Justice, the Federal Bureau of Investigation ("FBI"), and the Bureau of Prisons ("BOP") appeal from the September 27, 2005, Order of the District Court for the Eastern District of New York (John Gleeson, District Judge) denying in part their motions to dismiss on the ground of qualified immunity. *See Elmaghraby v. Ashcroft*, No. 04 CV 1409, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005) ("*Dist. Ct. op.*"). Plaintiff-Appellee Javaid Iqbal alleges that the Defendants-Appellants took a series of unconstitutional actions against him in connection with his confinement under harsh conditions at the Metropolitan Detention Center ("MDC") in Brooklyn, after separation from the general prison population. We conclude

that the defense of qualified immunity, to the extent rejected by the District Court, cannot be sustained as to any Defendants at this preliminary stage of the litigation except as to the claim of violation of procedural due process rights, and we therefore affirm in part, reverse in part, and remand.

Background

Parties. Iqbal is a Muslim Pakistani currently residing in Pakistan. Iqbal's co-plaintiff was Ehad Elmaghraby, a Muslim Egyptian. After Judge Gleeson's ruling on the motions to dismiss, the United States settled Elmaghraby's claims by payment of $300,000.

Four groups of Defendants have filed appeals from Judge Gleeson's order. The first group consists of former Attorney General John Ashcroft and current FBI Director Robert Mueller. The second group consists of Michael Rolince, former Chief of the FBI's International Terrorism Operations Section, Counterterrorism Division, and Kenneth Maxwell, former Assistant Special Agent in Charge of the FBI's New York Field Office (the "FBI Defendants"). The third group consists of former BOP officials: Kathleen Hawk Sawyer, former BOP Director; David Rardin, former Director of the Northeast Region of the Bureau of Prisons; and Michael Cooksey, former Assistant Director for Correctional Programs of the Bureau of Prisons (the "BOP Defendants"). The fourth appeal was filed by Dennis Hasty, former MDC Warden. Other Defendants include Michael Zenk, MDC Warden at the time the lawsuit was filed, other MDC staff, and the United States.

Factual allegations. The complaint alleges the following facts, which are assumed to be true for pur-

poses of the pending appeals, as we are required to do in reviewing a ruling on a motion to dismiss. *See Hill v. City of New York*, 45 F.3d 653, 657 (2d Cir. 1995). The Plaintiff was arrested by agents of the FBI and the Immigration and Naturalization Service on November 2, 2001.[1] Following his arrest, he was detained in the MDC's general prison population until January 8, 2002, when he was removed from the general prison population and assigned to a special section of the MDC known as the Administrative Maximum Special Housing Unit ("ADMAX SHU"), where he remained until he was reassigned to the general prison population at the end of July 2002. On this appeal, we consider only claims concerning the Plaintiff's separation from the general prison population and confinement thereafter in the ADMAX SHU. We do not consider the legality of his arrest or his initial detention in the MDC.

The complaint further alleges that in the months after 9/11, the FBI arrested and detained thousands of Arab Muslim men as part of its investigation into the events of 9/11. The fact of their detention, its duration, and the conditions of confinement depended on whether those arrested were classified as "of high interest." Many of these men, including the Plaintiff, were classified as "of high interest" solely because of their race,[2] religion, and national origin and not

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[1] The complaint does not identify the charges on which Iqbal was arrested, but Judge Gleeson' s opinion states that he was charged with conspiracy to defraud the United States and fraud with identification. *Dist. Ct. op.* at *1 n.1.

[2] Iqbal is a Muslim and a Pakistani, but not an Arab. Nevertheless, his claim is fairly to be understood as alleging unlawful treatment based on his ethnicity, even if not technically on a racial classification. And his allegations of what was done to Arab Muslims are fairly understood to mean that unlawful

because of any involvement in terrorism. In the New York City area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was investigating a 9/11 lead were classified as "of high interest. The FBI Defendants were responsible for making these classifications for detainees arrested in the New York City area, including the Plaintiff.

The complaint further alleges that Ashcroft and Mueller approved a policy of holding detainees "of high interest" in highly restrictive conditions until they were "cleared" by the FBI. In early October, BOP Defendant Cooksey, with the knowledge of BOP Defendant Sawyer, directed that all detainees "of high interest" be held in the most restrictive conditions possible. FBI officials were aware that the BOP was relying on this classification to hold detainees in restrictive conditions.

The complaint further alleges that soon after 9/11, the MDC created within the MDC an ADMAX SHU, the BOP's most restrictive type of confinement, to house the detainees "of high interest." The procedures for handling ADMAX SHU detainees were developed by MDC staff, at the request of Defendant Hasty. ADMAX SHU detainees were permitted to leave their cells only one hour each day, and all legal and social interactions were non-contact. Movement outside their cells required handcuffs and leg irons and four-officer escorts. Movement inside their cells was monitored by video cameras. For many weeks, the detainees were subject to a communications blackout.

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actions were taken against him because officials believed, perhaps because of his appearance and his ethnicity, that he was an Arab.

The complaint further alleges that the MDC did not conduct any review of the detainees' segregation in the ADMAX SHU. Instead, the detainees remained in the ADMAX SHU until the FBI approved their release to the general population. As a result, numerous detainees were held in the ADMAX SHU for extended periods of time even though there was no evidence linking them to terrorism.

The complaint further alleges that the Plaintiff was transferred to the ADMAX SHU on January 8, 2002. He was kept in solitary confinement. Until March, the lights in his cell were left on almost 24 hours a day, and MDC staff deliberately turned on air conditioning during the winter and heating during the summer. MDC staff left the Plaintiff in the open-air recreation area for hours when it was raining and then turned on the air conditioner when he returned to his cell. Whenever the Plaintiff was removed from his cell, he was handcuffed and shackled. The Plaintiff was not provided with adequate food and lost 40 pounds while in custody. MDC staff called him, among other things, a "terrorist" and a "Muslim killer."

The complaint further alleges that the Plaintiff was brutally beaten by MDC guards on two occasions: upon his transfer to the ADMAX SHU in January 2002 and again in March. Following the March beating, the Plaintiff was denied medical care for two weeks even though he was in excruciating pain. He was also subjected to daily strip and body-cavity searches. The March beating was prompted by the Plaintiff's protestations to a fourth consecutive strip and body-cavity search in the same room. MDC staff interfered with the Plaintiff's prayers, routinely confiscated his Koran, and refused to permit him to

participate in Friday prayer services. They also interfered with the Plaintiff's communications with his defense attorney, for example, by disconnecting the phone if the Plaintiff complained about his conditions of confinement and delaying his receipt of legal mail for up to two months.

The Plaintiff pled guilty on April 22, 2002, and was sentenced on September 17, 2002. He was released from the ADMAX SHU at the end of July 2002, after pleading guilty but before sentencing. Judge Gleeson considered the Plaintiff to be a pretrial detainee throughout his entire time in the ADMAX SHU. *Dist. Ct. op.* at *15 n.14. The Plaintiff was released from the MDC on January 15, 2003, and thereafter was removed to Pakistan (a fact not in the complaint but undisputed).

Litigation in the District Court. The Plaintiff (and his co-plaintiff) commenced this action in May 2004. Their complaint asserted twenty-one causes of action, including both statutory claims and constitutional tort claims pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The causes of action, and the Defendants against whom they were asserted, are set forth in the margin.[3]

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[3] The claims, in the order set forth in the complaint, are:

1. Fifth Amendment substantive due process claim based on the conditions of confinement: Hasty and MDC staff.
2. Fifth Amendment procedural due process claim based on confinement in the ADMAX SHU: Ashcroft and Mueller, FBI Defendants, BOP Defendants, Hasty, and MDC staff.

3-4. Fifth and Eighth Amendments excessive force claims: Hasty and MDC staff.

Ashcroft and Mueller, the FBI Defendants, the BOP Defendants, Hasty, the MDC Warden, and an

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5. Sixth Amendment interference with right to counsel claim: Hasty and MDC staff.

6-7. Fifth and Eighth Amendments denial of medical treatment claims: MDC staff (not at issue on this appeal).

8. Eighth Amendment conditions of confinement claim: Hasty and MDC staff.

9, Fourth Amendment unreasonable search claim based on strip and body-cavity searches: BOP Defendant Sawyer (but not other BOP Defendants), Hasty, and MDC staff.

10. First Amendment claim based on interference with religious practice: Hasty and MDC staff.

11. First Amendment claim based on religious discrimination: Ashcroft and Mueller, FBI Defendants, BOP Defendants, Hasty, and MDC staff.

12. Fifth Amendment race-based equal protection claim: Ashcroft and Mueller, FBI Defendants, BOP Defendants, Hasty, and MDC staff.

13. Religious Freedom Restoration Act ("RFRA") claim based on conditions of confinement: Ashcroft and Mueller, FBI Defendants, BOP Defendants, Hasty, and MDC staff.

14-15. RFRA claims based on interference with religious practice and excessive force: Hasty and MDC staff.

16-17. 42 U.S.C. § 1985(3) claims for conspiracy to deprive the Plaintiff of equal protection on the grounds of religion, race, and national origin: Ashcroft and Mueller, BOP Defendants, Hasty, and MDC staff.

18-20. Federal Tort Claims Act ("FTCA") claims for assault and battery, negligent denial of medical treatment, intentional infliction of emotional distress: United States.

21. Alien Tort Claims Act ("ATCA") claim: Ashcroft and Mueller, FBI Defendants, BOP Defendants, Hasty, and MDC staff.

MDC medical assistant[4] filed motions to dismiss on the grounds that (1) a *Bivens* action was precluded by "special factors", (2) they were protected by qualified immunity, (3) the supervisory defendants were not alleged to have sufficient personal involvement, and (4) Ashcroft, Mueller, the FBI Defendants, and the BOP Defendants were not subject to personal jurisdiction in New York. In addition, the United States moved to be substituted as the defendant on the ATCA claim (Count 21) and for dismissal of that claim.

With a few exceptions, Judge Gleeson denied the motions to dismiss. He first rejected Ashcroft's argument that "special factors," namely the post-9/11 context, precluded a *Bivens* action in this case. *See Dist. Ct. op.* at *14. Judge Gleeson then turned to the substance of the Plaintiff's *Bivens* claims. He denied Hasty's motion to dismiss the conditions of confinement claims (Counts One and Eight), concluding that the Plaintiff had adequately alleged (1) illegitimate reasons for the conditions of his confinement and (2) Hasty's personal involvement. *See id.* at *15-*17. He also found adequate allegations of Hasty's personal involvement in the claims of excessive force (Counts Three and Four), interference with the Plaintiff's right to counsel (Count Five), unreasonable strip searches (Count Nine), and interference with the Plaintiff's exercise of religion (Count Ten). *See id.* at *22, *27, *28. However, he found the allegations insufficient to support the personal involvement of BOP Defendant Sawyer in the unreasonable strip

[4] Zenk, the MDC Warden at the time the lawsuit was filed, and the MDC medical assistant are not appealing Judge Gleeson's ruling.

searches and dismissed this claim against her. *See id.* at *27.

With respect to the procedural due process claim (Count Two), Judge Gleeson found that the Plaintiff had alleged both a deprivation of a liberty interest that involved "atypical and significant" hardships compared to the conditions in the general prison population and the absence of any due process protections, that the Plaintiff's right was clearly established, and that he could not assess the objective reasonableness of the Defendants' actions as a matter of law at this stage of the litigation. *See id.* at *18-*20. He also found that the Plaintiff had adequately alleged the personal involvement of all the Defendants, observing that "the post-September 11 context provide[d] support for [the P]laintiffs' assertions that [the D]efendants were involved in creating and/or implementing the detention policy under which [the P]laintiffs were confined without due process." *See id.* at *20-*21. Finally, with respect to the procedural due process claim, he limited the first stage of discovery to the issue of the Defendants' personal involvement in the alleged denial of due process. *See id.* at *21.

With respect to the Plaintiff's *Bivens* claims of race and religious discrimination (Counts 11 and 12), Judge Gleeson ruled that the Plaintiff's allegations that he was confined in significantly harsher conditions solely because of his race and religion were sufficient to state a cause of action. *See id.* at *29. He also concluded that the Plaintiff had adequately alleged the personal involvement of Ashcroft and Mueller, the FBI Defendants, and Hasty. *See id.* However, because the Plaintiff had not alleged that the BOP Defendants were involved in the challenged classi-

fication in any way, Judge Gleeson concluded that the Plaintiff had not alleged the personal involvement of the BOP Defendants, and he dismissed these claims against them. *See id.*

Turning to the Plaintiff's statutory claims, Judge Gleeson dismissed the RFRA claims against all the Defendants, concluding that they were entitled to qualified immunity because it was not clearly established that RFRA applied to federal government officials. *See id.* at *30-*31. He also dismissed the ATCA claim after first having substituted the United States for the individual defendants. *See id.* at *34-*35. Finally, he denied the motions to dismiss the section 1985(3) conspiracy claims, rejecting the Defendants' arguments that it was not clearly established that section 1985 applied to federal officers and concluding that the Plaintiff had adequately alleged the Defendants' personal involvement, except with respect to the allegation that the BOP Defendants had conspired to subject the Plaintiff to unreasonable strip searches. *See id.* at *32-*33.

Discussion

The Defendants appeal from the District Court's order denying their motions to dismiss on the ground of qualified immunity. Their arguments with respect to qualified immunity fall into several broad categories: (1) the Plaintiff's allegations do not allege the violation of a clearly established right, (2) do not allege sufficient personal involvement of the Defendants in the challenged actions, (3) are too conclusory to overcome a qualified immunity defense, and (4) the Defendants' actions were objectively reasonable. Permeating the Defendants' assertion of a qualified immunity defense is the contention that, however the defense might be adjudicated in normal circum-

stances, the immediate aftermath of the 9/11 attack created a context in which the defense must be assessed differently and, from their standpoint, favorably.

In addition, Ashcroft, Mueller, and FBI Defendant Rolince seek review of the denial of their motion to dismiss for lack of personal jurisdiction, arguing that the issue of personal jurisdiction is available for review on this interlocutory appeal because the issue is inextricably intertwined with that of qualified immunity.

Because many of the Defendants' grounds for asserting an immunity defense overlap with respect to several of the Plaintiff's allegations, it will be convenient to consider separately each of the Plaintiff's causes of action with respect to the one or more Defendants against whom it is asserted, rather than consider separately the claims asserted against each Defendant. Before turning to each of the Plaintiff's allegations, we first consider the legal standards that apply to nearly all of the Plaintiff's claims and to most of the grounds on which the Defendants assert their qualified immunity defense.

I. General Principles of Qualified Immunity

(a) *Standard of review.* When a district court denies qualified immunity on a Rule 12 (b) (6) motion to dismiss, "we review the district court's denial *de novo*, accepting as true the material facts alleged in the complaint and drawing all reasonable inferences in plaintiffs' favor." *Johnson v. Newburgh Enlarged School District*, 239 F.3d 246, 250 (2d Cir. 2001).

(b) *Appealability.* A district court's denial of qualified immunity is appealable as a collateral order if it turns on an issue of law. *See Mitchell v. Forsyth*, 472

U.S. 511, 530 (1985). Thus, a defendant may appeal a district court's ruling denying qualified immunity when, if a plaintiff's allegations are assumed to be true, the only question is whether the alleged conduct violated a clearly established right. *See Locurto v. Safir*, 264 F.3d 154, 163 (2d Cir. 2001).

(c) *The qualified immunity defense.* Qualified immunity is an immunity from suit and not just a defense to liability. *See Saucier v. Katz*, 533 U.S. 194, 200 (2001). The first step in a qualified immunity inquiry is to determine whether the alleged facts demonstrate that a defendant violated a constitutional right. *See id.* at 201; *see also Scott v. Harris*, 127 S. Ct. 1769, 1774 & n.4 (2007). If the allegations show that a defendant violated a constitutional right, the next step is to determine whether that right was clearly established at the time of the challenged action—that is, "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *See Saucier*, 533 U.S. at 202. A defendant will be entitled to qualified immunity if either (1) his actions did not violate clearly established law or (2) it was objectively reasonable for him to believe that his actions did not violate clearly established law. *See Johnson*, 239 F.3d at 250.

In determining whether a right was clearly established, the court must assess whether "the contours of the right [were] sufficiently clear in the context of the alleged violation such that a reasonable official would understand that what he [was] doing violate[d] that right." *Id.* at 250-51 (internal quotation marks omitted). To that end, the court should consider what a reasonable officer in the defendant's position would have known about the lawfulness of his conduct, "not what a lawyer would learn or intuit from researching

case law." *Id.* at 251 (internal quotation marks omitted). Furthermore, the court need not identify "legal precedent addressing an identical factual scenario" to conclude that the right is clearly established. *Id.*; *see also Tellier v. Fields*, 280 F.3d 69, 84 (2d Cir. 2000) (noting that a law is "clearly established" so long as a ruling on the issue is "clearly foreshadow[ed]" by this Circuit's decisions).

(d) *Personal involvement.* Many of the Defendants claim qualified immunity on the ground that the Plaintiff has failed to allege their personal involvement in the challenged actions. All of the appealing Defendants are supervisory officials. The personal involvement of a supervisor may be established by showing that he (1) directly participated in the violation, (2) failed to remedy the violation after being informed of it by report or appeal, (3) created a policy or custom under which the violation occurred, (4) was grossly negligent in supervising subordinates who committed the violation, or (5) was deliberately indifferent to the rights of others by failing to act on information that constitutional rights were being violated. *See Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995) (discussing section 1983 liability).

Although a lack of personal involvement may be grounds for dismissing a claim on the merits (a ruling that would not be subject to an interlocutory appeal), such a lack is also relevant to a defense of qualified immunity because it goes to the question of whether a defendant's actions violated a clearly established right. *See McCullough v. Wyandanch Union Free School District*, 187 F.3d 272, 280 (2d Cir. 1999) ("Where there is a total absence of evidence of [a violation], there is no basis on which to conclude that the defendant seeking qualified immunity violated

clearly established law." (internal quotation marks omitted)). "[O]ur task is to consider whether, as a matter of law, the factual allegations and all reasonable inferences therefrom are insufficient to establish the required showing of personal involvement." *Johnson*, 239 F.3d at 255.

(e) *Pleading requirements.* The parties dispute the extent to which a plaintiff must plead specific facts to overcome a defense of qualified immunity at the motion-to-dismiss stage. Although most of the Defendants disclaim requiring the Plaintiff to meet a heightened pleading standard, beyond the requirement of *Conley v. Gibson*, 355 U.S. 41, 47 (1957), that a complaint "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests," *see* Fed. R. Civ. P. 8(a)(2), all the Defendants make the somewhat similar argument that "conclusory allegations" will not suffice to withstand a qualified immunity defense, especially with respect to allegations of supervisory involvement, racial and/or religious animus, or conspiracy. BOP Defendant Cooksey explicitly urges us to adopt a heightened pleading standard in *Bivens* actions.

The pleading standard to overcome a qualified immunity defense appears to be an unsettled question in this Circuit. Four Supreme Court opinions provide guidance, although the guidance they provide is not readily harmonized. In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), the Court rejected a heightened pleading standard in a civil rights action alleging municipal liability, applying instead only the traditional requirement of "'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* at 168 (quoting Fed. R. Civ. P. 8 (a) (2)). In

reaching this conclusion, the Court distinguished between municipalities' immunity from *respondeat superior* liability and government officials' qualified immunity from suit. *See id.* at 166. Arguably, this distinction could permit requiring a plaintiff to satisfy a heightened pleading standard of a cause of action in order to overcome a government official's defense of qualified immunity. However, the Court's opinion in *Leatherman* suggests that heightened pleading standards are never permissible except when authorized by Rule 9(b) of the Federal Rules of Civil Procedure. *See id.* at 168 (noting that Rule 9(b) "do[es] not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983"). Indeed, the Court observed that, in the absence of amendment to Rules 8 or 9, the courts could rely only on control of discovery and summary judgment to "weed out unmeritorious claims." *Id.* at 168-69.

A more pertinent precedent is *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), which concerned the adequacy of pleading a Title VII complaint. The Court rejected what had been this Circuit's rule requiring employment discrimination plaintiffs to allege facts constituting a *prima facie* case of employment discrimination. *See id.* at 515. The Court again emphasized that the judicially imposed heightened pleading standard conflicted with Rule 8(a) and that a heightened pleading standard could be attained only "by the process of amending the Federal Rules, and not by judicial interpretation." *Id.* (internal quotation marks omitted).

Leatherman and especially *Swierkiewicz*—with their insistence that courts cannot impose heightened pleading standards in the absence of statutory

authorization—indicate that a court cannot impose a heightened pleading standard in *Bivens* (or other civil rights) actions against individual officials, a precept we have heeded since the Supreme Court's decision in *Swierkiewicz*. *See, e.g., Phillip v. University of Rochester*, 316 F.3d 291, 298-99 (2d Cir. 2003) (general allegation of racial animus); *Phelps v. Kapnolas*, 308 F.3d 180, 186-87 (2d Cir. 2002) (general allegation of knowledge).

However, a third Supreme Court case, decided between *Leatherman* and *Swierkiewicz*, cryptically suggests that, in some circumstances, a court could require "specific nonconclusory factual allegations" at the pleading stage in claims against government officials. In *Crawford-El v. Britton*, 523 U.S. 574 (1998), the D.C. Circuit had recognized a heightened burden of proof in cases against government officials alleging unconstitutional motive. *See id.* at 582-83. The Court observed that the D.C. Circuit had adopted the heightened standard in an attempt "to address a potentially serious problem: Because an official's state of mind is easy to allege and hard to disprove, insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials." *Id.* at 584-85 (internal quotation marks omitted). Although the Supreme Court recognized this problem, it rejected the heightened standard of proof.

The Court held that the D.C. Circuit's rule was not compelled by either the holding or the reasoning of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In *Harlow*, the Court had stated that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.* at 817-18. However, as the

Court explained in *Crawford-El*, this statement merely concerned a plaintiff's attempt to overcome a legitimate qualified immunity defense by alleging malicious intent; this holding was irrelevant to a plaintiff's burden in alleging a constitutional violation of which improper motive is an essential element. *See* 523 U.S. at 588-89. Neither did Harlow's reasoning require a heightened burden of proof: the Court observed that there existed other mechanisms for protecting officials from unmeritorious actions, such as the requirement that the officials' conduct violate clearly established law, the need to prove causation, and procedural protections. *See id.* at 590-93.

The Court acknowledged that the usual pleading standard would sometimes not preclude at least limited discovery to amplify general allegations. The Court observed that *Harlow* only "sought to protect officials from the costs of 'broad-reaching' discovery" and that limited discovery is sometimes necessary to adjudicate a qualified immunity defense. *See id.* at 593 n.14. The Court concluded by observing that "broad discretion" in the discovery process is more "useful and equitable" than categorical rules such as that of the D.C. Circuit. *See id.* at 601.

What *Crawford-El* gave civil rights plaintiffs with respect to traditional notice pleading, however, it might have modified by permitting some post-complaint detailing of a claim. In discussing the procedural mechanisms available to judges in civil rights actions, at least those alleging wrongful motive, the Court observed that, before permitting discovery, a court could require a plaintiff to "put forward specific, non-conclusory factual allegations that establish improper motive causing cognizable injury in order to

survive a prediscovery motion for dismissal or summary judgment." *Id.* at 598 (internal quotation marks omitted). Perhaps significantly, the Court quoted the phrase "put forward specific, nonconclusory factual allegations" from Justice Kennedy's concurring opinion in *Siegert v. Gilley*, 500 U.S. 226 (1991), in which he had explicitly advocated a heightened pleading standard for civil rights actions requiring a showing of malice. *See id.* at 235-36 ("There is tension between the rationale of *Harlow* and the requirement of malice, and it seems to me that the heightened pleading requirement is the most workable means to resolve it.").

The First Circuit has remarked that "[w]hatever window of opportunity [it] thought remained open after *Crawford-El* has been slammed shut by the Supreme Court's subsequent decision in *Swierkiewicz*." *Educadores Puertorriqueños en Acción v. Hernandez*, 367 F.3d 61, 65 (1st Cir. 2004). Most Circuits appear to have rejected a heightened pleading standard. *See Doe v. Cassel*, 403 F.3d 986, 988-89 & n.3 (8th Cir. 2005) (collecting cases); *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir. 2002) (same).

Considerable uncertainty concerning the standard for assessing the adequacy of pleadings has recently been created by the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). If we were to consider only a narrow view of the holding of that decision, we would not make any adjustment in our view of the applicable pleading standard. *Bell Atlantic* held that an allegation of parallel conduct by competitors, without more, does not suffice to plead an antitrust violation under 15 U.S.C. § 1. *See id.* at 1961. The Court required, in addition, "enough factual matter (taken as true) to suggest that an

agreement was made." *Id.* at 1965. However, the Court's explanation for its holding indicated that it intended to make some alteration in the regime of pure notice pleading that had prevailed in the federal courts ever since *Conley v. Gibson*, 355 U.S. 41 (1957), was decided half a century ago. The nature and extent of that alteration is not clear because the Court's explanation contains several, not entirely consistent, signals, which we consider (not necessarily in the order set forth in the Court's opinion).

Some of these signals point toward a new and heightened pleading standard. First, the Court explicitly disavowed the oft-quoted statement in *Conley* of "'the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Bell Atlantic*, 127 S. Ct. at 1968 (quoting *Conley*, 355 U.S. at 45-46). *Bell Atlantic* asserted that this "no set of facts" language "has earned retirement" and "is best forgotten." *Id.* at 1969.

Second, the Court, using a variety of phrases, indicated that more than notice of a claim is needed to allege a section 1 violation based on competitors' parallel conduct. For example, the Court required "enough factual matter (taken as true) to suggest that an agreement was made," *id.* at 1965; "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement," *id.*; "facts that are suggestive enough to render a § 1 conspiracy plausible," *id.*; "allegations of parallel conduct . . . placed in a context that raises a suggestion of a preceding agreement," id. at 1966; "allegations plausibly suggesting (not merely consistent with) agree-

ment," *id.*; a "plain statement" (as specified in Rule 8(a)(2)) with "enough heft" to show entitlement to relief, *id.*; and "enough facts to state a claim to relief that is plausible on its face," *id.* at 1974, and also stated that the line "between the factually neutral and the factually suggestive. . . must be crossed to enter the realm of plausible liability," *id.* at 1966 n.5., and that "the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible," *id.* at 1973 n.14.

Third, the Court discounted the ability of "'careful case management,'" "to weed[] out early in the discovery process" "a claim just shy of a plausible entitlement." *Id.* at 1967 (quoting id. at 1975 (Stevens, J., dissenting)).

Fourth, the Court encapsulated its various formulations of what is required into what it labeled "the plausibility standard." *Id.* at 1968. Indeed, the Court used the word "plausibility" or an adjectival or adverbial form of the word fifteen times (not counting quotations).

On the other hand, some of the Court's linguistic signals point away from a heightened pleading standard and suggest that whatever the Court is requiring in *Bell Atlantic* might be limited to, or at least applied most rigorously in, the context of either all section 1 allegations or perhaps only those section 1 allegations relying on competitors' parallel conduct. First, the Court explicitly disclaimed that it was "requir[ing] heightened fact pleading of specifics," *id.* at 1974, and emphasized the continued viability of *Swierkiewicz*, *see id.* at 1973-74, which had rejected a heightened pleading standard. *See also Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (citing *Bell Atlantic*'s citation of *Swierkiewicz*).

Second, although the Court faulted the plaintiffs' complaint for alleging "merely legal conclusions" of conspiracy, *id.* at 1970, it explicitly noted with approval Form 9 of the Federal Civil Rules, Complaint for Negligence, which, with respect to the ground of liability, alleges only that the defendant "negligently drove a motor vehicle against plaintiff who was then crossing [an identified] highway," Fed. R. Civ. P. App. Form 9. *See Bell Atlantic*, 127 S. Ct. at 1970 n.10. The Court noted that Form 9 specifies the particular highway the plaintiff was crossing and the date and time of the accident, *see id.*, but took no notice of the total lack of an allegation of the respects in which the defendant is alleged to have been negligent, *i.e.*, driving too fast, crossing the center line, running a traffic light or stop sign, or even generally failing to maintain a proper lookout. The adequacy of a generalized allegation of negligence in the approved Form 9 seems to weigh heavily against reading *Bell Atlantic* to condemn the insufficiency of all legal conclusions in a pleading, as long as the defendant is given notice of the date, time, and place where the legally vulnerable conduct occurred.

Third, the Court placed heavy emphasis on the "sprawling, costly, and hugely time-consuming" discovery that would ensue in permitting a bare allegation of an antitrust conspiracy to survive a motion to dismiss, *see id.* at 1967 n.6, and expressed concern that such discovery "will push cost-conscious defendants to settle even anemic cases," *id.* at 1967. These concerns provide some basis for believing that whatever adjustment in pleading standards results from *Bell Atlantic* is limited to cases where massive discovery is likely to create unacceptable settlement pressures.

Fourth, although the Court expressed doubts about the ability of district courts to "*weed[ ] out*" through case management in the discovery process "a claim just shy of a plausible entitlement to relief," *id.* (emphasis added), the Court did not disclaim its prior statement that "federal courts and litigants must rely on summary judgment and control of discovery to *weed out* unmeritorious claims sooner rather than later." *Leatherman*, 507 U.S. at 168-69 (emphasis added).[5] Leaving *Leatherman* and *Crawford-El* undisturbed (compared to the explicit disavowal of the "no set of facts" language of Conley) further suggests that *Bell Atlantic*, or at least its full force, is limited to the antitrust context.

Fifth, just two weeks after issuing its opinion in *Bell Atlantic*, the Court cited it for the traditional proposition that "[s]pecific facts are not necessary [for a pleading that satisfies Rule 8(a)(2)]; the statement need only '"give the defendant fair notice of what the . . . cla*im is and the grounds upon which it rests."'" Erickson, 127 S. Ct. at 2200 (quoting *Bell Atlantic*'s quotation from *Conley*) (omission in original).

These conflicting signals create some uncertainty as to the intended scope of the Court's decision.[6] We

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[5] There is no possibility that the "weed out" language of *Leatherman* was overlooked; it was called to the Court's attention in Justice Stevens's dissent. *See Bell Atlantic*, 127 S. Ct. at 1982.

[6] The parties, not surprisingly, view *Bell Atlantic* entirely differently. Defendant Hasty characterizes the Supreme Court's decision as a "sea change" in the pleading standard of Rule 8, *see* Letter from Michael L. Martinez, counsel for Defendant Hasty, to the Acting Clerk of this Court (May 25, 2007); the Plaintiff emphasizes the antitrust holding of the decision, *see*

are reluctant to assume that all of the language of *Bell Atlantic* applies only to section 1 allegations based on competitors' parallel conduct or, slightly more broadly, only to antitrust cases.[7] Some of the language relating generally to Rule 8 pleading standards seems to be so integral to the rationale of the Court's parallel conduct holding as to constitute a necessary part of that holding. *See* Pierre N. Leval, *Judging under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. Rev. 1249, 1257 (2006) ("The distinction [between holding and dictum] requires recognition of what was the question before the court upon which the judgment depended, how (and by what reasoning) the court resolved the question, and what role, if any, the proposition played in the reasoning that led to the judgment.").

After careful consideration of the Court's opinion and the conflicting signals from it that we have identified, we believe the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible "plausibility standard," which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*. We will say more about this approach as we apply it below to some of the Plaintiff's specific allegations.

Notwithstanding what we understand to be the essential message of *Bell Atlantic*, we acknowledge

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Letter from Alexander A. Reinert, counsel for Plaintiff Iqbal, to the Acting Clerk of this Court (May 22, 2007).

[7] For example, it would be cavalier to believe that the Court's rejection of the "no set of facts" language from *Conley*, which has been cited by federal courts at least 10,000 times in a wide variety of contexts (according to a Westlaw search), applies only to section antitrust claims.

that we see some merit in the argument in favor of a heightened pleading standard in this case for two reasons. First, qualified immunity is a privilege that is essential to the ability of government officials to carry out their public roles effectively without fear of undue harassment by litigation. In this respect, the factors favoring a heightened pleading standard to overcome a qualified immunity defense are distinguishable from the purely prudential and policy-driven factors that the Supreme Court found inadequate to justify a heightened pleading standard in the Title VII context. *See Swierkiewicz*, 534 U.S. at 514-15.

Second, some of the allegations in the Plaintiff's complaint, although not entirely conclusory, suggest that some of the Plaintiff's claims are based not on facts supporting the claim but, rather, on generalized allegations of supervisory involvement. Therefore, allowing some of the Plaintiff's claims to survive a motion to dismiss might facilitate the very type of broad-ranging discovery and litigation burdens that the qualified immunity privilege was intended to prevent.

Nevertheless, although *Swierkiewicz* was decided in the context of Title VII, we are mindful of the Supreme Court's statement in that decision that heightened pleading requirements "must be attained by the process of amending the Federal Rules, and not by judicial interpretation." *Id.* at 514 (internal quotation marks omitted). Absent any indication from the Supreme Court that qualified immunity might warrant an exception to this general approach and the explicit disclaimer of a heightened pleading standard in *Bell Atlantic*, reinforced by the reversal of the Tenth Circuit's use of a heightened pleading

standard in *Erickson*, we conclude that a heightened pleading rule may not be imposed. However, in order to survive a motion to dismiss under the plausibility standard of *Bell Atlantic*, a conclusory allegation concerning some elements of a plaintiff's claims might need to be fleshed out by a plaintiff's response to a defendant's motion for a more definite statement. *See* Fed. R. Civ. P. 12(e). In addition, even though a complaint survives a motion to dismiss, a district court, while mindful of the need to vindicate the purpose of the qualified immunity defense by dismissing nonmeritorious claims against public officials at an early stage of litigation, may nonetheless consider exercising its discretion to permit some limited and tightly controlled reciprocal discovery so that a defendant may probe for amplification of a plaintiff's claims and a plaintiff may probe such matters as a defendant's knowledge of relevant facts and personal involvement in challenged conduct. In a case such as this where some of the defendants are current or former senior officials of the Government, against whom broad-ranging allegations of knowledge and personal involvement are easily made, a district court might wish to structure such limited discovery by examining written responses to interrogatories and requests to admit before authorizing depositions, and by deferring discovery directed to high-level officials until discovery of front-line officials has been completed and has demonstrated the need for discovery higher up the ranks. If discovery directed to current or former senior officials becomes warranted, a district court might also consider making all such discovery subject to prior court approval.

We note that Rule 8(a)'s liberal pleading requirement, when applied mechanically without countervailing discovery safeguards, threatens to create a

dilemma between adhering to the Federal Rules and abiding by the principle that qualified immunity is an immunity from suit as well as from liability. Therefore, we emphasize that, as the claims surviving this ruling are litigated on remand, the District Court not only may, but "must exercise its discretion in a way that protects the substance of the qualified immunity defense . . . so that officials [or former officials] are not subjected to unnecessary and burdensome discovery or trial proceedings." *Crawford-El*, 523 U.S. at 597-98 (emphasis added). In addition, the District Court should provide ample opportunity for the Defendants to seek summary judgment if, after carefully targeted discovery, the evidence indicates that certain of the Defendants were not sufficiently involved in the alleged violations to support a finding of personal liability, or that no constitutional violation took place. *See Harlow*, 457 U.S. at 821 (Brennan, J., concurring) ("[S]ummary judgment will also be readily available whenever the plaintiff cannot prove, as a threshold matter, that a violation of his constitutional rights actually occurred."). We give these matters additional consideration below with respect to particular claims.

(f) *The post-9/11 context.* Several Defendants contend that even if the Plaintiff's complaint would survive a motion to dismiss in the face of a qualified immunity defense under normal circumstances, the post-9/11 context requires a different outcome. This argument is advanced on three fronts. First, some Defendants contend that the Government was entitled to take certain actions that might not have been lawful before 9/11 because the Government's interests assumed special weight in the post-9/11 context. Second, some Defendants contend that, even if the law was clearly established as to the existence of a

right claimed to have been violated, it was not clearly established in the extraordinary circumstances of the 9/11 attack and its aftermath. Third, some Defendants contend that the post-9/11 context renders their actions objectively reasonable, an argument we do not reach in view of our disposition of their second contention.

We fully recognize the gravity of the situation that confronted investigative officials of the United States as a consequence of the 9/11 attack. We also recognize that some forms of governmental action are permitted in emergency situations that would exceed constitutional limits in normal times. *See Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 425-26 (1934) ("While emergency does not create power, emergency may furnish the occasion for the exercise of power."). But most of the rights that the Plaintiff contends were violated do not vary with surrounding circumstances, such as the right not to be subjected to needlessly harsh conditions of confinement, the right to be free from the use of excessive force, and the right not to be subjected to ethnic or religious discrimination. The strength of our system of constitutional rights derives from the steadfast protection of those rights in both normal and unusual times.

With some rights, for example, the right to be free from unreasonable searches, the existence of exigent circumstances might justify governmental action that would not otherwise be permitted. *See, e.g., Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (exigent circumstances permitted warrantless entry into home). But, as we discuss below, see Part VI, the exigent circumstances of the post-9/11 context do not diminish the Plaintiff's right not to be needlessly harassed and

mistreated in the confines of a prison cell by repeated strip and body-cavity searches. This and other rights, such as the right to be free from use of excessive force and not to be subjected to ethnic or religious discrimination, were all clearly established prior to 9/11, and they remained clearly established even in the aftermath of that horrific event. To whatever extent exigent circumstances might affect the lawfulness of the Defendants' actions or might have justified an objectively reasonable belief that their actions did not violate clearly established law, we consider the argument in connection with a particular claim.

With these general principles in mind, we turn to the Plaintiff's specific claims.

II. Procedural Due Process

The Plaintiff alleges that Ashcroft and Mueller, the FBI Defendants, the BOP Defendants, and Hasty adopted a policy under which he was deprived of a liberty interest without any of the procedural protections required by due process of law. His allegation of the deprivation of a liberty interest, even while lawfully confined without bail on criminal charges, is based on his placement in solitary confinement, where he was subjected to needlessly harsh restrictions that were atypical and significant when compared to those in the rest of the MDC population. The Defendants contend that (1) the Plaintiff did not allege that the confinement was punitive; (2) no procedural due process right was violated because the Plaintiff did not have a liberty interest in avoiding extended confinement in the ADMAX SHU and, even if he did, he received all the process that was due; (3) even if the Plaintiff's procedural due process right was violated, the contours of this right were not clearly established at the time of the events in ques-

tion; (4) the Defendants' actions were objectively reasonable in the post-9/11 context; and (5) the Plaintiff has failed to allege personal involvement.

We are required by the Supreme Court's decision in *Saucier* to assess these arguments within a two-part framework, asking first whether the alleged facts show a violation of a constitutional right, *see Saucier*, 533 U.S. at 201, and, if so, "whether the right was clearly established . . . in light of the specific context of the case," *see id.* The first, second, and fifth of the Defendants' arguments bear on the initial issue of whether a violation has been alleged; the third argument—whether the right was clearly established—is precisely the second issue under *Saucier*; and the fourth argument is often a further component of a qualified immunity defense because even if the law was clearly established, it might have been objectively reasonable, on the facts of a particular case, for a defendant to believe that the actions taken did not violate that established law, *see Johnson*, 239 F.3d at 250.

(a) Has a Violation of a Procedural Due Process Right Been Adequately Pleaded?

In assessing the adequacy of the Plaintiff's pleading of a procedural due process violation we first consider the basic question of whether the Plaintiff has pleaded the existence of a liberty interest and entitlement to procedures that were not provided and then consider the Defendants' arguments that punitive intent and personal involvement were not adequately pleaded.

(i) *The Plaintiff's procedural due process right.* In concluding that the Plaintiff had a protected liberty interest, Judge Gleeson relied on this Court's

decision in *Tellier v. Fields*, 280 F.3d 69 (2d Cir. 2000). *See Dist. Ct. op.* at *17-*18. In *Tellier*, a federal inmate allegedly was placed in administrative detention in the SHU for more than 500 days without being informed of the reasons for his placement or receiving any hearings. *See* 280 F.3d at 74. The regulations governing administrative segregation, 28 C.F.R. § 541.22, entitle inmates to "an administrative detention order detailing the reasons for placing an inmate in administrative detention . . . provided institutional security is not compromised thereby." 28 C.F.R. § 541.22(b). Moreover, the regulations require a Segregation Review Officer to "hold a hearing and formally review the status of each inmate who spends seven continuous days in administrative detention, and thereafter . . . hold a hearing and review these cases formally at least every 30 days." *Id.* § 541.22(c)(1). The regulations specifically provide that administrative detention "is to be used only for short periods of time except . . . where there are exceptional circumstances, ordinarily tied to security or complex investigative concerns." *Id.*

In assessing whether a prisoner had a protected liberty interest in avoiding administrative segregation, *Tellier* looked to *Sandin v. Conner*, 515 U.S. 472 (1995), in which the Supreme Court held that state-created liberty interests of prisoners were limited to freedom from restraint that "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 483-84. Since *Sandin*, the rule in this Circuit has been that a prisoner has a protected liberty interest "'only if the deprivation . . . is atypical and significant and the state has created the liberty interest by statute or regulation.'" *Tellier*, 280 F.3d at 80 (quoting *Sealey v. Giltner*, 116 F.3d 47, 52 (2d Cir. 1997)) (omission in

original); *see also Palmer v. Richards*, 364 F.3d 60, 64 & n.2 (2d Cir. 2004).

Numerous cases in this Circuit have discussed the "atypical and significant hardship" prong of *Sandin*. Relevant factors include both the conditions of segregation and its duration. *See Palmer*, 364 F.3d at 64. Segregation of longer than 305 days in standard SHU conditions is sufficiently atypical to require procedural due process protection under *Sandin*. *See id.* at 65 (citing *Colon v. Howard*, 215 F.3d 227, 231 (2d Cir. 2000)). When confinement is of an intermediate duration—between 101 and 305 days—"'development of a detailed record' of the conditions of the confinement relative to ordinary prison conditions is required." *Id.* at 64-65 (quoting *Colon*, 215 F.3d at 232).

Applying these standards, *Tellier* first observed that the prisoner had alleged confinement of more than 500 days "under conditions that differ markedly from those in the general population," finding this sufficient to allege "atypical and significant" hardships. 280 F.3d at 80. Turning to the language of the regulations, the Court agreed that because the initial decision to place a prisoner in administrative detention is a discretionary one, the plaintiff did not have a "protected liberty interest that is violated when the Warden removes him or her from the general population." *Id.* at 82. However, the Court found, the regulations constrain the warden's discretion in maintaining a prisoner in detention and the procedures "are designed to ensure that a prisoner is kept in SHU for no longer than is necessary." *Id.* at 82-83. Accordingly, the Court concluded that section 541.22 "creates a protectable liberty interest when an official's failure to adhere to the [regulation] results in

an atypical, significant deprivation." *Id.* at 83 (internal quotation marks omitted).

Relying on *Tellier,* Judge Gleeson concluded that the Plaintiff had a clearly established protectable liberty interest in avoiding continued detention in the ADMAX SHU. *See Dist. Ct. op.* at *18. On appeal, the Defendants contend that *Tellier* is no longer good law in light of the Supreme Court's recent opinion in *Wilkinson v. Austin*, 545 U.S. 209 (2005). In *Wilkinson*, the Supreme Court considered *Sandin*'s application to segregation in Ohio's Supermax facility. Inmates in the Supermax facility were detained in solitary confinement indefinitely, they remained in their cells 23 hours a day, the lights were turned on constantly, they could not go outside for recreation, and they were limited to non-contact visits. *See id.* at 214-15. The Court confirmed *Sandin*'s holding that "a liberty interest in avoiding particular conditions of confinement may arise from state policies or regulations, subject to the important limitations set forth in *Sandin*," *id.* at 222, but observed that "the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves in relation to the ordinary incidents of prison life," *id.* at 223 (internal quotation marks omitted). The Court recognized that the courts of appeals had struggled to identify a baseline for determining what constitutes an atypical and significant hardship, but it concluded that confinement in the Supermax facility "imposes an atypical and significant hardship under any plausible baseline." *Id.* Having found that the prisoner had a protected liberty interest, the Court concluded that Ohio's "informal, nonadversary procedures" were suf-

ficient to satisfy due process requirements. *Id.* at 228-29.

The Defendants argue that *Wilkinson* abrogates *Tellier* or that it at least renders the relevant standard unclear because it instructs courts to consider the nature of the conditions, not the requirements of the regulations. We disagree for two reasons. First, while *Wilkinson* instructs courts to focus on the nature of the conditions, it nonetheless explains that the "liberty interest in avoiding particular conditions of confinement . . . arise[s] from state policies or regulations." *Id.* at 222. Following *Tellier*, Judge Gleeson looked to the duration and conditions of confinement, as instructed by *Wilkinson*. *See Dist. Ct. op.* at *18.

Second, and more significantly, for at least half (if not all) of the Plaintiff's confinement in the ADMAX SHU, he was a pretrial detainee, not a convicted prisoner.[8] This Court has said that *Sandin* does not

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[8] The Defendants do not seriously contest Judge Gleeson's characterization of the Plaintiff as a pretrial detainee, although Ashcroft and Mueller briefly contend that his private interest in avoiding detention in the ADMAX SHU after he pled guilty should be evaluated "within the context of the prison system," *i.e.*, under Eighth Amendment standards. The Plaintiff argues that he should be treated as a pretrial detainee until he was sentenced, citing *Fuentes v. Wagner*, 206 F.3d 335, 341 (3d Cir. 2000).

The circuits are divided as to whether to treat convicted, but unsentenced, inmates as pretrial detainees. *Compare id.* (treated as pretrial detainee) *with Resnick v. Hayes*, 213 F.3d 443, 448 (9th Cir. 2000) (treated as prisoner), *Whitnack v. Douglas County*, 16 F.3d 954, 956-57 (8th Cir. 1994) (same), *and Berry v. City of Muskogee*, 900 F.2d 1489, 1493 (10th Cir. 1990) (same). Because none of the Defendants seriously challenges Judge Gleeson's characterization of the Plaintiff as a pretrial detainee

apply to pretrial detainees and that, accordingly, pretrial detainees need not show that an imposed restraint imposes atypical and significant hardships to state deprivation of a liberty interest protected by procedural due process. *See Benjamin v. Fraser*, 264 F.3d 175, 188-89 (2d Cir. 2001) ("*Benjamin I*"). In *Benjamin I*, this Court affirmed the district court's ruling that the imposition of painful physical restraints during the move-ment of pretrial detainees required "reasonable after-the-fact procedural protections to ensure that such restrictions on liberty [would] be terminated reasonably soon if they [had] no justification." *Id.* at 188.

In sum, *Wilkinson* does not affect the validity of Judge Gleeson's ruling that the Plaintiff had a protected liberty interest because (1) he considered the Plaintiff's allegations of atypical and significant hardships and (2) the *Wilkinson* and *Sandin* analysis does not apply to the interval of the Plaintiff's pretrial detention. Under this Court's case law, the Plaintiff's confinement of more than six months fell in the intermediate range, thereby requiring inquiry into the conditions of his confinement, which he sufficiently alleges to have been severe. Even under *Wilkinson*, the conditions under which the Plaintiff alleges that he was confined—solitary confinement, repeated strip and body-cavity searches, beatings, exposure to excessive heat and cold, very limited

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throughout his entire confinement in the ADMAX SHU, we will refer to him as a pretrial detainee, a status that plainly applies during the several months of confinement prior to the Plaintiff's plea. We do not consider the question of whether convicted, but unsentenced, inmates are pretrial detainees under the Supreme Court's jurisprudence establishing criteria for evaluating constitutional limits on conditions of confinement.

exercise, and almost constant lighting—as well as the initially indefinite duration of confinement could be found to constitute atypical and significant hardships. *See* 545 U.S. at 223-24. The Plaintiff has alleged a protected liberty interest in avoiding more than six months' detention in the ADMAX SHU, especially in light of his status as a pretrial detainee.

The Defendants also dispute the violation of a procedural due process right by arguing that, even if the Plaintiff had a protected liberty interest in avoiding extended detention in the ADMAX SHU, he received all the process that was due by virtue of the FBI's review. This argument is unavailing at this preliminary stage of the litigation. In *Wilkinson*, the Supreme Court applied the familiar balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine whether the plaintiff received adequate procedural protections. *See* 545 U.S. at 224-25. Under the second prong of this test, the Court observed that inmates received "notice of the factual basis leading to consideration for OSP placement and a fair opportunity for rebuttal," stating that "these are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations." *Id.* at 225-26. After weighing all the relevant factors, the Court found that "[w]here the inquiry draws more on the experience of prison administrators, and where the State's interest implicates the safety of other inmates and prison personnel, . . . informal, nonadversary procedures" were sufficient. *Id.* at 228-29. In the pending case, the Plaintiff alleges that he did not even receive notice of the factual grounds on which he was being detained in the ADMAX SHU nor did he have any opportunity for rebuttal.

We recognize that in the post-9/11 context the first *Mathews* factor—the gravity of the Government's interest—is appropriately accorded more weight than would otherwise be warranted. It might be that the combination of (1) the Government's interest, accorded added weight in the post-9/11 context, (2) the Plaintiff's interest in avoiding confinement under harsh conditions, and (3) the risk of an erroneous determination of the need for such confinement would, on balance, lead to the conclusion that the Government need not have given the Plaintiff notice and a chance for rebuttal *before* placing him in the ADMAX SHU. However, once it became clear that the Plaintiff was going to be confined in the ADMAX SHU for an extended period of time, some process was required. We cannot say in the absence of a developed factual record whether the FBI's clearance procedure comported with the requirements of the Due Process Clause as interpreted in *Mathews* and subsequent cases. The sparse record thus far developed provides no indication as to what security-related steps the Defendants were taking that might justify prolonged confinement. Nor does that record indicate in what respect providing the Plaintiff with some notice of the basis for his separation in the ADMAX SHU and affording some opportunity for rebuttal would have impaired national security interests or legitimate penological interests of the Government. The Government has not as yet had an opportunity to refute the Plaintiff's allegation that there was no evidence connecting him to terrorism. Accordingly, we cannot say whether the Government's national security interests rendered the clearance procedure sufficient to satisfy procedural due process requirements or whether more traditional procedural protections were required. Nevertheless,

because we are required at this stage of the litigation to accept all of the Plaintiff's allegations as true and draw all reasonable inferences in his favor, we cannot say that the Plaintiff has failed to plead a viable claim under the procedural component of the Due Process Clause. Judge Gleeson dismissed the Plaintiff's procedural due process claim with respect to the initial confinement in the ADMAX SHU, *Dist. Ct. op.* at *17 n.18, but properly ruled that the Plaintiff had stated a procedural due process claim with respect to his continued confinement, *see id.* at *18-*19.

(ii) *Punitive intent.* Ashcroft, Mueller, and Hasty, citing *Bell v. Wolfish*, 441 U.S. 520 (1979), contend that the Plaintiff has not stated a claim that the confinement in the ADMAX SHU violated his procedural due process rights because he has not alleged that the confinement was punitive. Preliminarily, we note that the complaint alleges that the Defendants designed a policy under which the Plaintiff was "arbitrarily designated to be confined in the ADMAX SHU" and that "[k]eeping Plaintiff[] in isolation . . . amounted to the willful, malicious, and unnecessary infliction of pain and suffering." This is sufficient to allege that the confinement was punitive in nature.

More fundamentally, however, we deem unsupportable the Defendants' premise that the Plaintiff's procedural due process claim requires an allegation of punitive intent. Defendants Ashcroft and Mueller cite *Wolfish*, 441 U.S. at 535, for the proposition that "in evaluating the constitutionality of conditions or restrictions of pretrial detention, the proper inquiry under the Due Process Clause is whether the conditions 'amount to punishment of the detainee.'" However, *Wolfish* did not involve a claim that inadequate procedures had been used to impose challenged con-

ditions of confinement. The claim there was that the challenged conditions of confinement, being punitive, could not be imposed on pretrial detainees at all because they had not been convicted. Although the Court did not consider the challenged conditions punitive, it ruled that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Id.* This ruling implements the substantive component of the Due Process Clause.[9]

By contrast, the relevant line of authority for the Plaintiff's procedural due process claim begins with *Wolff v. McDonnell*, 418 U.S. 539 (1974), and continues through *Hewitt v. Helms*, 459 U.S. 460 (1983), and *Sandin*, 515 U.S. 472. Wolff outlined fairly extensive procedures that must be observed before a prisoner's liberty interest in retaining good time credits could be impaired because of disciplinary violations. 418 U.S. at 563-72. *Helms* required only notice of charges and an opportunity to rebut in order to place a prisoner in administrative segregation pending an investigation of misconduct charges. 459 U.S. at 476. *Sandin* modified *Helms* by making the

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[9] Since *Wolfish* prohibited punishment prior to the process of adjudicating guilt, it could be considered a decision vindicating a procedural claim. However, as the Supreme Court's decisions in *Wolff v. McDonnell*, 418 U.S. 539 (1974), *Hewitt v. Helms*, 459 U.S. 460 (1983), and *Sandin*, 515 U.S. 472, make clear, when the Court is truly considering a claim that restrictions were imposed within a prison without adequate procedures, it is focusing precisely on the procedural requirements of the Due Process Clause, and not what in reality is the substantive component that was at issue in *Wolfish*. *See Block v. Rutherford*, 468 U.S. 576, 591 & n.12 (1984) (applying *Wolfish* to pretrial detainees' substantive due process claim and distinguishing it from a procedural due process claim).

existence of a prisoner's liberty interest turn primarily on the atypical nature of the challenged conditions of confinement, 515 U.S. at 483-87, but did not alter the basic requirement that where a prisoner's liberty interest exists, its impairment requires some procedural protections.

The Plaintiff's liberty interest, based primarily on a federal regulation, is entitled to some procedural protection regardless of punitive intent. To the extent that the interest derives directly from the Due Process Clause (and hence requires procedural protection only when punishment is imposed, *see Wolfish*, 441 U.S. at 535), the harsh conditions set forth in the complaint adequately meet the criteria for punishment, *see Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), whether or not such conditions were imposed with punitive intent.

(iii) *Lack of personal involvement.* Defendants Ashcroft and Mueller contend that the Plaintiff has not adequately alleged their personal involvement in the denial of procedural due process because the continued detention decision was made by FBI subordinates. Applying the standards applicable to personal involvement outlined above, we reject this claim at this stage of the litigation. Ashcroft and Mueller are alleged to have condoned the policy under which the Plaintiff was held in harsh conditions of confinement until "cleared" by the FBI. Since the complaint adequately alleges, for purposes of a motion to dismiss, that procedural due process required some procedures beyond FBI clearance, the allegation of condoning the policy of holding the Plaintiff in the ADMAX SHU until cleared suffices, at the pleading stage, to defeat dismissal for lack of personal involvement.

At the other end of the leadership chain, Defendant Hasty asserts his lack of personal involvement because the continued detention decision was made far above his level of responsibility. But this defense also cannot prevail at this stage of the litigation. *Cf. Anthony v. City of New York*, 339 F.3d 129, 138 (2d Cir. 2003) ("Plausible instructions from a superior . . . support qualified immunity where, viewed objectively in light of the surrounding circumstances, they could lead a reasonable officer to conclude that the necessary legal justification for his actions exists (*e.g.*[,] . . . exigent circumstances)." (internal quotation marks omitted)). Hasty is alleged to have known of the continued detention in the ADMAX SHU and the absence of procedural protections for the Plaintiff. Whether his conduct as a subordinate was objectively reasonable under all the circumstances is an issue distinct from the adequacy of the pleading of personal involvement.

Between these extremes in the official hierarchy, the lack of adequate allegations of personal knowledge of, or involvement in, the Plaintiff's continued detention is also asserted by the FBI Defendants and the BOP Defendants. However, the complaint at least implicitly alleges the knowledge of the FBI Defendants by stating that they "failed to approve post-September 11 detainees' release to general population." With respect to the BOP Defendants, the complaint alleges that BOP Defendant Cooksey "directed that all detainees 'of high interest' be confined in the most restrictive conditions possible until cleared by the FBI," that BOP Defendant Sawyer approved this policy, and that BOP Defendant Rardin, along with others, designed the policy of arbitrary confinement in the ADMAX SHU. The FBI Defendants also dispute their personal involvement

in a procedural due process violation by arguing that they could not reasonably be expected to know about the BOP regulations. However, some factual development of this claim would have to precede its determination. Moreover, even absent the FBI Defendants' knowledge of the BOP regulation, the complaint can support the inference that the FBI Defendants understood that their alleged role in the clearance procedure was linked to a detainee's release to the general population. This suffices to overcome the defense of no personal involvement at this stage of the litigation.

It is arguable that, under the plausibility standard of *Bell Atlantic*, some subsidiary facts must be alleged to plead adequately that Ashcroft and Mueller condoned the Plaintiff's continued confinement in the ADMAX SHU, that Hasty had knowledge of that confinement, or that the mid-level Defendants knew the relationship between their clearance procedure and the Plaintiff's release to the general population. However, all of the Plaintiff's allegations respecting the personal involvement of these Defendants are entirely plausible, without allegations of additional subsidiary facts. This is clearly so with respect to Hasty and the mid-level Defendants. Even as to Ashcroft and Mueller, it is plausible to believe that senior officials of the Department of Justice would be aware of policies concerning the detention of those arrested by federal officers in the New York City area in the aftermath of 9/11 and would know about, condone, or otherwise have personal involvement in the implementation of those policies. Sustaining the adequacy of a pleading of personal involvement in these circumstances runs no risk that every prisoner complaining of a denial of rights while in federal custody anywhere in the United States can survive a

motion to dismiss simply by alleging that the Attorney General knew of or condoned the alleged violation. And, like the Form 9 complaint approved in *Bell Atlantic*, Iqbal's complaint informs all of the Defendants of the time frame and place of the alleged violations.

(b) Was the Plaintiff's Right to Procedural Due Process Clearly Established?

Although we conclude that the Plaintiff has adequately pleaded a violation of a procedural due process right, we also conclude that in this case "officers of reasonable competence could [have] disagree[d]," *Malley v. Briggs*, 475 U.S. 335, 341 (1986), whether their conduct violated a clearly established procedural due process right. Accordingly, the Plaintiff's right to additional procedures was not clearly established with the level of specificity that is required to defeat a qualified immunity defense. *See Brosseau v. Haugen*, 543 U.S. 194, 199-200 (2004).

Several factors combine to create this lack of clarity in prior case law. First, some uncertainty exists in determining when administrative segregation procedures are required even in the ordinary criminal context. Our case law would require an officer in the Defendants' situation to consider various factors including the length of the Plaintiff's confinement, the extent to which the conditions of confinement were atypical, the text of relevant BOP regulations, and the Plaintiff's status as a pretrial detainee. *See, e.g., Tellier,* 280 F.3d at 79-83. As noted above, no single factor is dispositive in this case, which concerns administrative segregation of approximately six months. Although the harshness of the conditions alleged weigh in favor of requiring procedural protections, an officer could reasonably note that the Plaintiff's six-

month continued confinement was comparable to the duration of confinements in cases that we characterized in *Tellier* as involving "relatively brief periods of confinement." *See id.* at 85.

Second, uncertainty in existing case law is heightened by the fact that, even on the facts alleged in the complaint, which specified that the "of high interest" designation pertained to the Government's post-9/11 terrorism investigation, the investigation leading to the Plaintiff's separation from the general prison population could be reasonably understood by all of the Defendants to relate to matters of national security, rather than an ordinary criminal investigation. Prior to the instant case, neither the Supreme Court nor our Court had considered whether the Due Process Clause requires officials to provide ordinary administrative segregation hearings to persons detained under special conditions of confinement until cleared of connection with activities threatening national security. *Cf. Forsyth*, 472 U.S. at 534-35 (granting Attorney General qualified immunity for warrantless wiretapping for national security purposes despite prohibitions of warrantless wiretapping in criminal context).

Third, the BOP regulation on which the Plaintiff relies itself contains potentially relevant exceptions that undermine certainty as to established requirements of law. "Administrative detention is to be used only for short periods of time except . . . where there are exceptional circumstances, *ordinarily tied to security or complex investigative concerns*," 28 C.F.R. § 541.22(c)(1) (emphasis added), and inmates are entitled to "an administrative detention order detailing the reasons for placing an inmate in administrative detention . . . *provided institutional security is not*

compromised thereby," *id.* § 541.22(b) (emphasis added).

In sum, these factors, taken together, would suffice to raise "a legitimate question," *Forsyth*, 472 U.S. at 535 n.12, among Government officials as to whether the Due Process Clause required administrative segregation hearings or any procedures other than the FBI's clearance system. *See id.* ("[W]here there is a *legitimate question* whether an exception to [a constitutional requirement] exists," failure to abide by the requirement "cannot be said [to have] violate[d] clearly established law." (emphasis added)). Accordingly, we will direct dismissal of the portions of the Plaintiff's complaint alleging violations of procedural due process rights. *See* Compl. ¶¶ 204-06. III. Conditions of Confinement

Hasty contends that Judge Gleeson should have dismissed the Plaintiff's conditions of confinement claims against him on the ground of qualified immunity because (1) the Plaintiff did not allege conditions amounting to a violation of substantive due process rights, (2) the Plaintiff failed to allege Hasty's deliberate indifference to the maintenance of the conditions of confinement, and (3) Hasty's actions were objectively reasonable under the circumstances.[10]

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[10] There is some question as to whether Hasty sought to dismiss the substantive due process claim or the excessive force claim, *see* Part IV, *infra*, in the District Court on the ground of qualified immunity, as distinguished from the merits of the claim. However, the District Court understood all the Defendants to "seek dismissal of all claims against them on qualified immunity grounds," *Dist. Ct. op.* at *10, and we are satisfied that we have jurisdiction of an appeal from the rulings that are premised on that understanding.

Because the Plaintiff was a pretrial detainee during his detention in the ADMAX SHU, his challenge to the conditions of his confinement arises from the substantive component of the Due Process Clause of the Fifth Amendment and not from the cruel and unusual punishment standards of the Eighth Amendment. *See Benjamin v. Fraser*, 343 F.3d 35, 49 (2d Cir. 2003) ("*Benjamin II*"). Pretrial detainees have not been convicted of a crime and thus "may not be punished in any manner—neither cruelly and unusually nor otherwise." *Id.* at 49-50. Courts considering challenges to confinement brought by pretrial detainees must first consider whether the circumstances of the particular confinement render the confinement punitive; since some restraint is necessary to confine a pretrial detainee, not all uncomfortable conditions or restrictions are necessarily punitive. *Id.* at 50. In *Bell v. Wolfish*, *supra*, the seminal case on the substantive due process claims of pretrial detainees, the Supreme Court recognized the following factors as relevant to the determination of whether a condition of confinement is punitive:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . ."

441 U.S. at 537-38 (quoting *Mendoza-Martinez*, 372 U.S. at 168-69). A court may infer that a condition of

confinement is intended as punishment if it is not reasonably related to a legitimate government objective. *See id.* at 539.

The complaint alleges, among other things, that MDC staff placed the Plaintiff in solitary confinement, deliberately subjected him to extreme hot and cold temperatures, shackled him every time he left his cell, and repeatedly subjected him to strip and body-cavity searches, and that these conditions were intended to be, and were in fact, punitive. Applying *Wolfish*, Judge Gleeson found these allegations sufficient to state a substantive due process claim, observing that whether the conditions were reasonably related to legitimate government objectives could not be determined on a motion to dismiss. *See Dist. Ct. op.* at *16.

Hasty contends that Judge Gleeson did not properly consider whether the Plaintiff alleged that he was "deprived of the minimal civilized measure of life's necessities" or whether Hasty was deliberately indifferent to the Plaintiff's health or safety. But this Court has never applied those standards in this context. In *Benjamin II*, we distinguished between challenges to disabilities imposed purposefully on pretrial detainees, which are analyzed under the *Wolfish* "punitive" inquiry, and pretrial detainees' challenges to prison environmental conditions. *See* 343 F.3d at 50. Recognizing that the "punitive" standard is neither required nor helpful in the context of environmental conditions, we adopted a modified version of the Eighth Amendment's deliberate indifference standard; we required a showing of deliberate indifference but stated that such indifference could be presumed from an absence of reasonable care. *See id.* We explicitly rejected

analogies to the Eighth Amendment that would require a showing of wantonness on the part of the prison official, *see id.* at 51, or a showing that the alleged conditions were so inhumane as to constitute cruel and unusual punishment, see id. at 52 (citing *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)).

The Plaintiff has alleged the purposeful infliction of restraints that were punitive in nature. Accordingly, the District Court need not have considered whether a Defendant was "deliberately indifferent" in inflicting the restraints or whether the restraints constituted cruel and unusual punishment. The right of pretrial detainees to be free from punitive restraints was clearly established at the time of the events in question, and no reasonable officer could have thought that he could punish a pretrial detainee by subjecting him to the practices and conditions alleged by the Plaintiff.

The Plaintiff alleges that Hasty (1) requested that certain officials develop procedures for the ADMAX SHU, (2) knew of the conditions of confinement to which Plaintiff was subjected, (3) approved the strip search policy, and (4) knew or should have known of the practice or custom of beating detainees. Under a notice pleading standard, reaffirmed in *Bell Atlantic* and *Erickson*, these allegations are sufficient to state a claim that Hasty failed to remedy constitutional violations of which he was aware. Moreover, the general allegations of knowledge, which are sufficient under *Phelps*, cited above, *see* Part I (e), are bolstered by the allegation that Hasty directed other officers to set up procedures for the ADMAX SHU.

Hasty's final argument is that, even if the Plaintiff has pled the violation of a clearly established right, Hasty's actions were objectively reasonable in the

post-9/11 context. He argues that the actions were taken "in the immediate aftermath of September 11th during the course of a large-scale investigation of unprecedented scope in United States history, and Plaintiff was, at that time, considered to be possibly complicit in the terrorist acts." As discussed above, *see* Part I (f), the post-9/11 context does not lessen the Plaintiff's right, as a pretrial detainee, to be free of punitive conditions of confinement.

IV. Excessive Force

The only argument of a Defendant directed to the claim of excessive force is Hasty's contention that the complaint does not allege his personal involvement.

The complaint alleges that Hasty knew or should have known of the MDC practice of beating detainees in the ADMAX SHU, that he knew or should have known of the propensity of his subordinates to beat the Plaintiff unnecessarily, and that he was deliberately indifferent in failing to take action to curtail the beatings. The complaint also alleges that Hasty chose the officers who worked in the ADMAX SHU.

Applying the standards for supervisory liability, outlined above, *see* Part I(d), the Plaintiff's allegations, on a notice pleading standard, *see* Part I(e), suffice to state a claim of supervisory liability for the use of excessive force against the Plaintiff. *See Phelps*, 308 F. 3d at 187 n.6 ("[A] plaintiff's allegation of knowledge is itself a particularized factual allegation, which he will have the opportunity to demonstrate at the appropriate time in the usual ways." (internal quotation marks omitted)). The plausibility standard requires no subsidiary facts at the pleading stage to support an allegation of Hasty' s knowledge because it is at least plausible that a

warden would know of mistreatment inflicted by those under his command. Whether such knowledge can be proven must await further proceedings.

V. Interference with Right to Counsel

Hasty argues that the Plaintiff did not adequately plead a violation of his Sixth Amendment right to counsel because (1) the complaint does not state that he was charged with criminal (as opposed to immigration) offenses and (2) he failed to plead supervisory involvement. Although, as Judge Gleeson observed, "the complaint could have been more transparent regarding plaintiffs' status as pretrial detainees facing criminal charges," *see Dist. Ct. op.* at *23, the complaint does refer to interference with the Plaintiff's conversations with his "criminal attorney." This allegation was sufficient to give Hasty "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47. As for the issue of supervisory liability, the complaint alleges that Hasty "knew of and condoned the imposition of substantial restrictions on Plaintiff's right to communicate with counsel." The Plaintiff's allegations of knowledge are sufficient to state a claim of supervisory liability, and, for the reasons stated above, satisfy the plausibility standard without an allegation of subsidiary facts.

VI. Unreasonable Searches

Hasty challenges Judge Gleeson's conclusion that he is not entitled to qualified immunity at this stage on the Plaintiff's Fourth Amendment claim on the grounds that (1) the law on prisoners' Fourth Amendment right to be free from strip and body-cavity searches was not clearly established and (2) Judge Gleeson failed to explain why the searches of

the Plaintiff did not serve legitimate penological interests.

As to whether the right to be free from strip and body-cavity searches was clearly established, Hasty argues that "the Circuits differ sharply on the existence of prisoner privacy rights under the Fourth Amendment outside of prison cells." This argument ignores the fact that it is this Circuit's law that determines whether a right is clearly established for purposes of a qualified immunity defense, *see Tellier*, 280 F.3d at 84, and Hasty does not reckon with the long line of Second Circuit cases on strip and body-cavity searches in prisons and jails. *See, e.g., Shain v. Ellison*, 273 F.3d 56 (2d Cir. 2001); *Covino v. Patrissi*, 967 F.2d 73 (2d Cir. 1992); *Weber v. Dell*, 804 F.2d 796 (2d Cir. 1986).

Under the *Saucier* framework for considering a qualified immunity defense, discussed above, we must first decide whether, assuming the Plaintiff's allegations are true, his Fourth Amendment rights were violated, which will require determining the proper standard for his claim.

The Supreme Court has held that visual body-cavity searches of pretrial detainees and prisoners after contact visits are not unreasonable under the Fourth Amendment, even in the absence of probable cause. *See Wolfish*, 441 U.S. at 558. Emphasizing that the Fourth Amendment prohibits only unreasonable searches, the Court instructed judges to consider "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.* at 558-59. Because of the potential for smuggling money, drugs, and weapons into prisons, the Court concluded that the practice of strip searching inmates

after contact visits was not facially unconstitutional. *See id.* at 559-60. Applying *Wolfish*, this Court has concluded that, while it might be reasonable to strip search a prisoner before initially placing him in administrative detention, it would not be reasonable to conduct a second strip search shortly after the first search if the prisoner was under continuous escort the entire time. *See Hodges v. Stanley*, 712 F.2d 34, 35 (2d Cir. 1983).

Since *Wolfish* and *Hodges*, two lines of cases involving strip searches have evolved in this Circuit. In *Weber v. Dell*, jail officials conducted a visual body-cavity search on a woman arrested on misdemeanor charges. *See* 804 F.2d at 799. This Court ruled that

> the Fourth Amendment precludes prison officials from performing strip/body cavity searches of arrestees charged with misdemeanors or other minor offenses unless the officials have a reasonable suspicion that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest.

Id. at 802; *see Wachtler v. County of Herkimer*, 35 F.3d 77, 81 (2d Cir. 1994) (accepting Weber but upholding immunity defense on the basis of reasonable suspicion of contraband); *Walsh v. Franco*, 849 F.2d 66, 69 (2d Cir. 1988) (applying Weber to hold a search unconstitutional).

However, in *Covino v. Patrissi*, we applied the "legitimate penological interests" standard outlined in *Turner v. Safley*, 482 U.S. 78, 89 (1987), to assess the constitutionality of a strip search of a pretrial detainee held in a prison with sentenced inmates. The prison in which Covino was detained had a policy

of random visual body-cavity searches. *Covino*, 967 F.2d at 75. Observing that the Supreme Court applied *Turner*'s "legitimate penological interests" test to all claims that prison regulations violate constitutional rights, *see Washington v. Harper*, 494 U.S. 210, 223-24 (1990), we analyzed the random search policy under the four factors of *Turner*:

> (i) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (ii) whether there are alternative means of exercising the right in question that remain open to prison inmates; (iii) whether accommodation of the asserted constitutional right will have an unreasonable impact upon guards and other inmates, and upon the allocation of prison resources generally; and (iv) whether there are reasonable alternatives available to the prison authorities.

Covino, 967 F.2d at 78-79 (citing *Turner*, 482 U.S. at 89-90). Applying these factors, we concluded that the regulation was rationally related to legitimate security interests, there were no alternative means of exercising the detainee's right that would allow the prison to achieve the same level of effectiveness, the regulation accommodated the privacy rights of the detainee by conducting the search behind closed doors, and there was no "alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests." *Id.* at 79-80 (internal quotation marks omitted).

In 2001, we attempted to reconcile these two lines of cases in *Shain v. Ellison, supra*. Judge Pooler's opinion for the majority observed that the *Turner* test governs the constitutionality of *prison* regulations.

See Shain, 273 F.3d at 65. By limiting *Covino* to *prison* regulations, she reconciled *Covino* and the "reasonable suspicion" line of cases beginning with *Weber*, which all concerned events occurring in *jails*. *See id.* at 65-66. In concurrence, Judge Katzmann remarked that this Circuit's precedents required a distinction "either between misdemeanors and felonies or between jails and prisons," but observed that he did not find the distinction persuasive. *See id.* at 70. Judge Cabranes, in dissent, criticized the jail/prison distinction and argued that *Weber*'s "reasonable suspicion" rule was not good law in light of *Turner*. *Id.* at 71-74; *see also N.G. v. Connecticut*, 382 F.3d 225, 234-35 (2d Cir. 2004) (rejecting the *Turner* standard for strip searches in juvenile detention centers).

On this appeal, the parties assume, as did Judge Gleeson, *see Dist. Ct. op.* at *26, that the proper inquiry is whether the Plaintiff was housed at a jail or a prison. Finding that the MDC was most like a prison, Judge Gleeson applied the *Covino*/*Turner* standard. *See id.* This was correct. The Plaintiff was confined for an extended period of time in a prison-like environment, and it appears that he was charged with felonies, *see* 18 U.S.C. §§ 371, 1028. In the environment where the Plaintiff was held, the lesser reasonable suspicion standard would jeopardize prison officials' ability to maintain security.

As Judge Gleeson recognized, even if the precise standard governing intrusive searches of the Plaintiff at the MDC might not have been clearly established in 2001, it was clearly established that even the standard most favorable to prison officials required that strip and body-cavity searches be rationally related to legitimate government purposes. *Cf. Hodges*,

712 F.2d at 35 (holding that a plaintiff stated a Fourth Amendment claim where consecutive body-cavity searches were unnecessary). The complaint alleges that the Plaintiff was routinely strip searched twice after returning from the medical clinic or court and that, on one occasion, the Plaintiff was subjected to three serial strip and body-cavity searches in the same room. He also alleges that he was subjected to strip and body-cavity searches every morning. These allegations may reasonably be understood to claim that repeated strip and body-cavity searches were unrelated to legitimate government purposes and apparently were performed to punish. The Plaintiff has adequately alleged a violation of his clearly established Fourth Amendment rights. Of course, the success or failure of these claims will turn on the specific facts that are revealed after discovery or at trial.

Although exigent circumstances can justify some conduct that would otherwise violate Fourth Amendment standards, *see, e.g., Tyler*, 436 U.S. at 509 (exigent circumstances justify warrantless entry into a home), the post-9/11 context does not provide a basis for conducting repeated and needless strip and body-cavity searches of a pretrial detainee. *See* Part I(f), above.

VII. Interference with Religious Practices

Hasty also argues that Judge Gleeson should have dismissed the Plaintiff's First Amendment claim against him on qualified immunity grounds because (1) BOP regulations "conclusively establish" a lack of personal involvement and (2) the Plaintiff did not allege a violation of his First Amendment rights.

Both arguments lack merit. Hasty contends that the only "policy" on religion at the MDC was the official BOP policy, codified at 28 C.F.R. part 548, and that the Plaintiff has not indicated that these policies were suspended or that he availed himself of available complaint procedures, *see* 28 C.F.R. part 542. Hasty contends that he "was under no clearly established constitutional obligation to take affirmative steps to inquire whether Plaintiff observed particular religious practices, but as the BOP regulations instruct, Plaintiff had the responsibility to make his religious preferences known." Br. for Hasty at 47. But neither the complaint procedures nor the official policy governing religion allowed Hasty to ignore violations of detainees' First Amendment rights. If Hasty is arguing that the Plaintiff has forfeited his right to recover damages because he did not follow administrative complaint procedures, this may be relevant to the merits of the case, but it is not relevant to a qualified immunity defense.

Similarly without merit, Hasty argues that he could not be personally involved in any deprivations of religious freedom because BOP regulations establish that prison chaplains "are responsible for managing religious activities within the institution." 28 C.F.R. § 548.12. As the Plaintiff points out, however, Hasty ignores other regulations stating that the warden determines, among other things, what religious items may be used by prisoners, *see id.* § 548.16, and whether attendance at religious functions is open to all prisoners, *id.* § 548.15.

Hasty's second argument is that Plaintiff has not alleged a violation of his First Amendment rights. He relies on *O' Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), which applied *Turner*'s "legitimate penological

interests" test to First Amendment claims, *see id.* at 348-49. Though recognizing that a prison regulation precluded some Muslim prisoners from attending Friday prayers, *see id.* at 345, the Supreme Court found the regulation justified under *Turner*, focusing on the officials' legitimate security objectives and the availability of other channels by which prisoners could exercise their religious rights, *see id.* at 350-53. In the pending case, however, the Plaintiff alleges that he was not allowed to attend Friday prayers, that prison guards banged on his door when he tried to pray, and that his Koran was routinely confiscated.[11] These allegations suffice to preclude a qualified immunity defense at this stage of the litigation. In particular, consideration of Hasty's arguments—that "restrictions on movement and possessions . . . were a necessary part of the legitimate and proper functioning of the maximum security procedures in the ADMAX SHU" and that such restrictions were "justified by security concerns and other institutional needs," Br. for Hasty at 49-50—must await factual discovery so that the Government's asserted security interests can be assessed against a factual record of what restrictions actually existed and what purpose they served.

VIII. Racial and Religious Discrimination

The Defendants argue that they are entitled to qualified immunity on the Plaintiff's First Amendment claim of religious discrimination and Fifth Amendment claim of racial or ethnic discrimination

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[11] Hasty's arguments that the repeated banging on Iqbal's cell while he prayed shows that he was at least allowed to pray, and that the repeated confiscation of his Koran shows that he was at least permitted to have a Koran need no response.

on three grounds: (1) the Plaintiff has failed to state a violation of clearly established rights, (2) the Plaintiff's allegations of discriminatory intent are too conclusory, and (3) the Plaintiff has not alleged the personal involvement of Ashcroft and Mueller.[12]

The arguments of Ashcroft and Mueller challenging the sufficiency of the Plaintiff's race, ethnic, and religious discrimination claims misunderstand his complaint. They contend that his "complaint amounts to an objection that most of those persons determined to be of high interest to the 9/11 investigation were Muslim or from certain Arab countries," which they justify by pointing out that the 9/11 hijackers were Muslims from Arab countries. However, what the Plaintiff is alleging is that he was deemed to be "of high interest," and accordingly was kept in the ADMAX SHU under harsh conditions, solely because of his race, ethnicity, and religion. The Plaintiff also alleges that "Defendants specifically targeted [him] for mistreatment because of [his] race, religion, and national origin." These allegations are sufficient to state a claim of animus-based discrimination that any "reasonably competent officer" would understand to have been illegal under prior case law. *See Malley*, 475 U.S. at 341; *see also Hayden v. County of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999) (stating that racial classifications violate Equal Protection Clause where motivated by racial animus and having a discriminatory effect). Accordingly, the Plaintiff's racial, ethnic, and religious discrimination claims cannot be dismissed on qualified immunity grounds at this stage of the litigation.

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[12] Judge Gleeson dismissed the discrimination claims against the BOP Defendants. See Dist. Ct. op. at *29.

Hasty also argues that the Plaintiff has failed to state a claim of discrimination. Citing *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) ("*AAADC*"), he argues that the Equal Protection Clause does not apply in the context of proceedings to remove illegal aliens and that the Government can permissibly deem nationals of a particular country to be a special threat. In *AAADC*, the Supreme Court concluded that a provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1252 (g), deprived the federal courts of jurisdiction to consider an illegal alien's selective enforcement challenge to deportation. *See* 525 U.S. at 487. The Court rejected the argument that it nevertheless had jurisdiction to consider an alien's constitutional arguments, holding that "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation," *see id.* at 488, even when the Government deports the alien "for the additional reason that it believes him to be a member of an organization that supports terrorist activity," *id.* at 492. *AAADC* affords the Defendants no relief. The Plaintiff is not challenging his deportation or even his arrest on criminal charges. Moreover, *AAADC* does not stand for the proposition that the Government may subject members of a particular race, ethnicity, or religion to more restrictive conditions of confinement than members of other races, ethnic backgrounds, or religions.

The Defendants argue that the Plaintiff's allegations of racial, ethnic, and religious animus are too conclusory. But, as discussed above, *see* Part I (e), *Crawford-El* indicates that courts cannot require a heightened pleading standard for civil rights complaints involving improper motive. In *Phillip*, 316

F.3d at 298-99, this Court held that *Swierkiewicz*'s notice pleading standard applied to a civil rights complaint alleging racial animus. Although recognizing that the complaint did not "contain many evidentiary allegations relevant to intent," *see id.* at 299, we found the allegations sufficient to state a claim, observing that the complaint alleged that the plaintiffs were African-American, described the defendants' actions in detail, and alleged that the plaintiffs were selected for maltreatment "solely because of their color," *id.* at 298.

The Plaintiff's allegations suffice to state claims of racial, ethnic, and religious discrimination. He alleges in particular that the FBI Defendants classified him "of high interest" solely because of his race, ethnic background, and religion and not because of any evidence of involvement in terrorism. He offers additional factual support for this allegation, stating that "within the New York area, all Arab Muslim men arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks—however unrelated the arrestee was to the investigation—were immediately classified as 'of interest' to the post-September 11th investigation." We need not consider at this stage of the litigation whether these allegations are alone sufficient to state a clearly established constitutional violation under the circumstances presented because they are sufficient to state a violation when combined with the Plaintiff's allegation that he was singled out for mistreatment and for unnecessarily punitive conditions of confinement based on his racial, ethnic, and religious characteristics.

Finally, Ashcroft and Mueller argue that the Plaintiff failed to allege their personal involvement in any discrimination. However, the complaint alleges broadly that Ashcroft and Mueller were instrumental in adopting the "policies and practices challenged here." The complaint also alleges that the FBI, "under the direction of Defendant Mueller," arrested thousands of Arab Muslims and that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject Plaintiff[] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." The Plaintiff acknowledges that the FBI Defendants made the determination that Plaintiff was "of high interest," but this allegation does not necessarily insulate Ashcroft and Mueller from personal responsibility for the actions of their subordinates under the standards of supervisory liability outlined above, *see* Part I(d). As with the procedural due process claim, the allegation that Ashcroft and Mueller condoned and agreed to the discrimination that the Plaintiff alleges satisfies the plausibility standard without an allegation of subsidiary facts because of the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated "of high interest" in the aftermath of 9/11. Whether or not the issues of personal involvement will be clarified by court-supervised discovery sufficient to support summary judgment remains to be determined.

IX. Section 1985(3) Conspiracy

The Defendants contend that they are entitled to qualified immunity on the Plaintiff's conspiracy claims under 42 U.S.C. § 1985(3) because (1) it was not clearly established that federal officials were subject to liability under section 1985(3), and (2) the Plaintiff's allegations of conspiracy are too conclusory to state a violation of clearly established law.

Clearly established law. A conspiracy claim under 42 U.S.C. § 1985(3) has four elements: (1) a conspiracy, (2) for the purpose of depriving any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws, (3) an act in furtherance of the conspiracy, and (4) whereby a person is injured in his person or property or deprived of a right or privilege of a citizen. *See United Brotherhood of Carpenters & Joiners of America, Local 610 v. Scott*, 463 U.S. 825, 828-29 (1983). In addition, the conspiracy must be motivated by some class-based animus. *See Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

In *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), this Court considered a section 1985(3) claim against several federal officials stemming from an allegedly false arrest. The Court first held that the officials had absolute immunity from the false arrest claim. *See id.* at 580-81. Turning to the section 1985(3) claim, the Court rejected the plaintiff's argument that "this language creates a claim against any two persons who conspire to injure another for spite or other improper motives, apparently because to single out anyone for illegal aggression is to deny him equal protection of the laws." *Id.* at 581. *Gregoire* has been interpreted by some lower courts to mean that section 1985(3) does not apply to federal officials.

See, e.g., Lofland v. Meyers, 442 F. Supp. 955, 957 (S.D.N.Y. 1977); *Williams v. Halperin*, 360 F. Supp. 554, 556 (S.D.N.Y. 1973); *see also Hobson v. Wilson*, 737 F.2d 1, 19 (D.C. Cir. 1984) (criticizing *Gregoire*).

In *Griffin*, the Supreme Court held that section 1985(3) contains no requirement of state action and thus applies to private conspiracies. *See* 403 U.S. at 101. Although this Court has had no occasion since *Gregoire* to consider whether section 1985(3) applies to conspiracies among federal officials, numerous courts of appeals, applying *Griffin*, have concluded that section 1985(3) applies to federal officials. *See, e.g., Hobson*, 737 F.2d at 20; *Jafree v. Barber*, 689 F.2d 640, 643 (7th Cir. 1982); *Gillespie v. Civiletti*, 629 F.2d 637, 641 (9th Cir. 1980); *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 931 (10th Cir. 1975).[13] We agree that the development of case law since has eroded any basis for interpreting that decision to render section 1985(3) inapplicable to federal officials. And we also agree that, in the absence of prior Second Circuit case law on point, it was not clearly established in 2001 that section 1985(3) applied to federal officials. However, even without a definitive ruling from this Court on the application of section 1985(3) to federal officials, federal officials could not reasonably have believed that it was legally permissible for them to conspire with other federal officials to deprive a person of equal protection of the laws, at least where the

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[13] BOP Defendant Cooksey cites post-*Griffin* cases from the Fifth and Third Circuits stating that section 1985(3) does not apply to federal officials. *See, e.g., Mack v. Alexander*, 575 F.2d 488, 489 (5th Cir. 1978); *Bethea v. Reid*, 445 F.2d 1163, 1164 (3d Cir. 1971). However, these cases cite pre-*Griffin* cases for this proposition and neglect to consider *Griffin*.

officials' conduct, alleged to have accomplished the discriminatory object of the conspiracy, would violate the Equal Protection Clause. As we have recently held, "[T]he proper inquiry is whether the *right* itself—rather than its *source*—is clearly established." *Russo v. City of Bridgeport*, 479 F.3d 196, 212 (2d Cir. 2007) (collecting cases).

Adequacy of allegations. Applying the normal pleading rules previously discussed, *see* Part I(e), even as supplemented by the plausibility standard, we have no doubt that the Plaintiff's allegations of a conspiracy to discriminate on the basis of ethnicity and religion suffice to withstand a motion to dismiss. Unlike the situation in *Bell Atlantic*, we do not encounter here a bare allegation of conspiracy supported only by an allegation of conduct that is readily explained as individual action plausibly taken in the actors' own economic interests.

X. Personal Jurisdiction

The final issue is whether Judge Gleeson erred in denying the motions by Ashcroft, Mueller, and FBI Defendant Rolince to dismiss for lack of personal jurisdiction. Ordinarily, we would lack jurisdiction over this issue on this interlocutory appeal concerning qualified immunity. However, "[a] defendant who is entitled to immediate appellate review of a qualified immunity decision is also entitled to appellate review of pendant issues if those issues are inextricably intertwined with the question of qualified immunity or are otherwise necessary to ensure meaningful review of it." *Toussie v. Powell*, 323 F.3d 178, 184 (2d Cir. 2003) (internal quotation marks omitted). "Whether issues are inextricably intertwined is determined by whether there is substantial factual overlap bearing on the issues raised." *Id.*

(internal quotation marks omitted). Judge Gleeson recognized the overlap between the Defendants' personal jurisdiction arguments and personal involvement arguments pertaining to qualified immunity. *See Dist. Ct. op.* at *10.

Under New York's long-arm statute, a court may exercise jurisdiction over a non-domiciliary who "in person or through an agent . . . commits a tortious act within the state" so long as the cause of action arises from that act. *See* N.Y. C.P.L.R. § 302(a)(2). As the District Court observed, *see Dist. Ct. op.* at *9-*10, personal jurisdiction cannot be predicated solely on a defendant's supervisory position. *See Ontel Products, Inc. v. Project Strategies Corp.*, 899 F. Supp. 1144, 1148 (S.D.N.Y. 1995). Rather, a plaintiff must show that a defendant "personally took part in the activities giving rise to the action at issue." *Id.*

The same intertwining of the issue of personal involvement with the issue of personal jurisdiction that provides us with pendent appellate jurisdiction also demonstrates that the pleading of personal involvement suffices to establish personal jurisdiction, at least at this preliminary stage of the litigation.

Conclusion

For the foregoing reasons, the order of the District Court is affirmed as to the denial of the Defendants' motions to dismiss all of the Plaintiff's claims, except for the claim of a violation of the right to procedural due process, as to which we reverse. In affirming almost all of the District Court's ruling, we emphasize that we do so at an early stage of the litigation. We recognize, as did Judge Gleeson in ruling on the Plaintiff's procedural due process claim, *see Dist. Ct.*

op. at *21, that carefully limited and tightly controlled discovery by the Plaintiff as to certain officials will be appropriate to probe such matters as the Defendants' personal involvement in several of the alleged deprivations of rights. We are mindful too that, for high level officials, this discovery might be either postponed until discovery of front-line officials is complete or subject to District Court approval and additional limitations. We also recognize that the Defendants will be entitled to seek more specific statements as to some of the Plaintiff's claims and perhaps renew their claims for qualified immunity by motions for summary judgment on a more fully developed record.

In sum, the serious allegations of gross mistreatment set forth in the complaint suffice, except as noted in this opinion, to defeat the Defendants' attempt to terminate the lawsuit at a preliminary stage, but, consistent with the important policies that justify the defense of qualified immunity, the defense may be reasserted in advance of trial after the carefully controlled and limited discovery that the District Court expects to supervise.

Affirmed in part, reversed in part, and remanded.

JOSÉ A. CABRANES, *Circuit Judge*, concurring:

I concur fully in Judge Newman's characteristically careful and comprehensive opinion, which seeks to hew closely to the relevant Supreme Court and Second Circuit precedents, including the Supreme Court's decision in *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007). That said, it is worth underscoring that some of those precedents are less than crystal clear and fully deserve reconsideration by the Supreme Court at the earliest opportunity; to say the least, "the guidance they provide is not readily harmonized," Maj. Op. at 18.

Most importantly, the opinion's discussion of the relevant pleading standards reflects the uneasy compromise—forged partially in *dicta* by the Supreme Court in *Crawford El v. Britton*, 523 U.S. 574 (1998)—between a qualified immunity privilege rooted in the need to preserve "the effectiveness of government as contemplated by our constitutional structure," *Harlow v. Fitzgerald*, 457 U.S. 800, 820 n.35 (1982), and the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure.

Here, that uneasy compromise presents itself in a case brought by Javaid Iqbal, a federally convicted felon now residing in his native Pakistan. Iqbal does not challenge his arrest in the aftermath of 9/11, his detention, his conviction, or his apparent subsequent deportation. Iqbal instead challenges his separation from the general prison population at the Metropolitan Detention Center and his treatment during that separation. He claims that his separation stemmed from a general policy authorized at the highest levels of government in the wake of 9/11. But most, if not all, of the assertedly unlawful actions in his complaint—including the decision to place

plaintiff in the ADMAX SHU and the abuses which purportedly ensued there—are alleged to have been carried out by defendants much lower in the chain of command.

Nevertheless, as a result of the Supreme Court's precedents interpreting Rule 8(a), even as modified by the "plausibility standard" established in *Bell Atlantic*, 127 S. Ct. at 1968, it is possible that the incumbent Director of the Federal Bureau of Investigation and a former Attorney General of the United States will have to submit to discovery, and possibly to a jury trial, regarding Iqbal's claims. If so, these officials—FBI Director Robert Mueller and former Attorney General John Ashcroft —may be required to comply with inherently onerous discovery requests probing, *inter alia*, their possible knowledge of actions taken by subordinates at the Federal Bureau of Investigation and the Federal Bureau of Prisons at a time when Ashcroft and Mueller were trying to cope with a national and international security emergency unprecedented in the history of the American Republic. In *Bell Atlantic*, the Supreme Court has quite rightly expressed concern that "careful case management" might not be able to "weed[] out early in the discovery process" an unmeritorious claim in private civil antitrust litigation, *see Bell Atlantic*, 127 S.Ct. at 1967, and might have limited success in "checking discovery abuse," *id.* This concern is all the more significant in the context of a lawsuit against, *inter alia*, federal government officials charged with responsibility for national security and entitled by law to assert claims of qualified immunity. Even with the discovery safeguards carefully laid out in Judge Newman's opinion, it seems that little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal gov-

ernment from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes.

The decision in this case may be required by the faithful application of the relevant precedents by a court of inferior jurisdiction. But a detached observer may wonder whether the balance struck here between the need to deter unlawful conduct and the dangers of exposing public officials to burdensome litigation—a balance compelled by the precedents that bind us—jeopardizes the important policy interest Justice Stevens aptly described as "a national interest in enabling Cabinet officers with responsibilities in [the national security] area to perform their sensitive duties with decisiveness and without potentially ruinous hesitation." *Mitchell v. Forsyth*, 472 U.S. 511, 541 (1985) (Stevens, *J.*, concurring in the judgment).

The Supreme Court's recognition in *Bell Atlantic* that "proceeding to . . . discovery can be expensive," *Bell Atlantic*, 127 S. Ct. at 1967 has particular resonance where, as here, discovery would not only result in significant cost but would also deplete the time and effectiveness of current officials and the personal resources of former officials. Indeed, as Justice Stevens noted, "[p]ersons of wisdom and honor will hesitate to answer the President's call to serve in these vital positions if they fear that vexatious and [in some cases] politically motivated litigation associated with their public decisions will squander their time and reputation, and sap their personal financial resources when they leave office." *Mitchell*, 472 U.S. at 542 (Stevens, J. concurring in the judgment); *see also Harlow*, 457 U.S. at 814 (noting the "danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties" (alteration in original) (internal quotation marks omitted)).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

Catherine O'Hagen Wolfe
CLERK OF COURT

[Filed SEP 18, 2007]

Docket Number 05-5768-cv
Short Title: Elmaghraby v. Ashcroft

DC Docket Number: 04-cv-1809
DC: EDNY (BROOKLYN)
DC Judge: Honorable John Gleeson

JAVID IQBAL,
Plaintiff-Appellee,

v.

DENNIS HASTY, former Warden of the Metropolitan Detention Center, MICHAEL COOKSEY, former Assistant Director of Correctional Programs of the Bureau of Prisons, JOHN ASHCROFT, Attorney General of the United States, ROBERT MUELLER, Director of the Federal Bureau of Investigation, DAVID RARDIN, Former Director of the Northeast Region of the Bureau Prisons, MICHAEL ROLINCE, Former Chief of the Federal Bureau of Investigation's International Terrorism Operations Section, Counterterrorism Division, KATHLEEN HAWK SAWYER, former Director of the Federal Bureau of Prisons, KENNETH MAXWELL, Former Assistant Special Agent in Charge, New York Field Office, Federal Bureau of Investigation,
Defendants-Appellants.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 18th day of September two thousand seven.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellees Ehab Elmaghraby and Javaid Iqbal, appellants John Ashcroft and Robert Mueller, and appellants Kenneth Maxwell and Michael Rolince. Upon consideration by the panel that decided the appeal, it is Order that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court:

Catherine O'Hagan, Wolfe, Clerk

By: /s/ [Illegible]
Motion Staff Attorney

APPENDIX E

U.S. Department of Justice
Office of the Inspector General

The September 11 Detainees:

A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the. Investigation of the September 11 Attacks

[Logo]

Office lf the Inspector General
April 2003

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CHAPTER ONE

INTRODUCTION

I. BACKGROUND

On September 11, 2001, terrorists hijacked four airplanes and flew two of them into the World Trade Center Towers in New York City and one into the Pentagon in Arlington, Virginia. The fourth plane crashed into a field in southwestern Pennsylvania before it could strike a target in Washington, D.C. The attacks killed more than 3,100 people, including all 246 people aboard the 4 airplanes.

The Federal Bureau of Investigation (FBI) immediately initiated a massive investigation, called "PENTTBOM," into this coordinated terrorist attack. The FBI investigation focused on identifying the terrorists who hijacked the airplanes and anyone who aided their efforts. In addition, the FBI worked with other federal, state, and local law enforcement agencies to prevent follow-up attacks in this country and against U.S. interests abroad.

Shortly after the attacks, the Attorney General directed the FBI and other federal law enforcement personnel to use "every available law enforcement tool" to arrest persons who "participate in, or lend support to, terrorist activities."[1] One of the principal responses by law enforcement authorities after the September 11 attacks was to use the federal immigration laws to detain aliens suspected of having possible ties to terrorism. Within 2 months of the attacks, law enforcement authorities had de-

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[1] Memorandum from Attorney General John Ashcroft to United States Attorneys entitled "Anti-Terrorism Plan" (September 17, 2001).

tained, at least for questioning, more than 1,200 citizens and aliens nationwide.[2] Many of these individuals were questioned and subsequently released without being charged with a criminal or immigration offense. Many others, however, were arrested and detained for violating federal immigration law.

Our review determined that the Immigration and Naturalization Service (INS) detained 762 aliens as a result of the PENTTBOM investigation. Of these 762 aliens, 24 were in INS custody on immigration violations prior to the September 11 attacks. The remaining 738 aliens were arrested between September 11, 2001, and August 6, 2002, as a direct result of the FBI's PENTTBOM investigation. All 762 detainees were placed on what became known as an "INS Custody List" because of the FBI's assessment that they may have had a connection to the September 11 attacks or terrorism in general, or because the FBI was unable, at least initially, to determine whether they were connected to terrorism.

The Government held these aliens in a variety of federal, local, and private detention facilities across the United States while the FBI investigated them

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[2] In the weeks and months following the attacks, various totals of the number of people arrested in connection with the September 11 investigation were released by the Department of Justice or appeared in media accounts. A senior official in the Department's Office of Public Affairs told the Office of the Inspector General that in the weeks after the terrorist attacks her office provided frequent updates to the media on the number of persons questioned, arrested, and detained by federal, state, and local law enforcement officials. According to this official, the Public Affairs Office stopped reporting the cumulative totals after the number reached approximately 1,200, because the statistics became confusing.

for ties to the September 11 attacks or terrorism in general. These facilities included several Federal Bureau of Prisons (BOP) institutions such as the Metropolitan Detention Center in Brooklyn, New York; the Federal Detention Center in Oakdale, Louisiana; and the U.S. Penitentiary in Leavenworth, Kansas; INS facilities such as the Krome Service Processing Center in Miami, Florida; and state and local facilities under contract with the INS to house federal immigration detainees, such as the Passaic County Jail in Paterson, New Jersey, and the Hudson County Correctional Center in Kearny, New Jersey.

Soon after these detentions began, the media began to report allegations of mistreatment of the detainees. For example, detainees and their attorneys alleged that the detainees were not informed of the charges against them for extended periods of time; were not permitted contact with attorneys, their families, and embassy officials; remained in detention even though they had no involvement in terrorism; or were physically abused, verbally abused, and mistreated in other ways while detained.

Several individual detainees and non-profit organizations filed lawsuits against the Department of Justice (Department) protesting the lack of public information about the detainees and the length and conditions of the detainees' confinement. For example, the Center for National Security Studies brought suit against the Department under the Freedom of Information Act seeking information about the detainees, including their names and

where they were being held.[3] Five detainees filed a class action lawsuit alleging they were physically abused, verbally abused, and held without a legitimate immigration or law enforcement purpose long after they received final removal or voluntary

* * * *

CHAPTER TWO

ARREST AND PROCESSING OF ALIENS IN RESPONSE TO THE SEPTEMBER 11 ATTACKS

This chapter describes the Department's initial response to the terrorist attacks. First, we examine the immediate actions taken by the FBI and INS in New York City to arrest and detain aliens in connection with the terrorism investigation. Next, we describe the Department's philosophy as it related to aliens arrested in connection with the terrorism probe, and we discuss some of the processes developed at FBI and INS Headquarters to coordinate information about these detainee cases. We also provide demographic statistics about the September 11 detainees. In addition, we describe the system used by the FBI, INS, and BOP to review and process aliens detained on immigration charges in connection with the terrorism investigation.

I. INITIAL LAW ENFORCEMENT RESPONSE

A. Initial FBI Response

The FBI took the lead in investigating the September 11 attacks, an investigation that became

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[3] *Center for National Security Studies v. United States Department of Justice*, 01-civ-2500 (D.D.C. filed December 6, 2002).

known as the Pentagon/Twin Towers Bombings investigation, or PENTTBOM. The FBI's investigation initially was affected by the chaotic situation in New York City as a result of the terrorist attacks, which displaced thousands of people from their homes and offices in lower Manhattan. As a result of the attacks, the FBI was forced to evacuate its New York City office in the Javits Federal Building at 26 Federal Plaza, seven blocks from what became known as "Ground Zero." Similarly, the INS was forced to evacuate all detainees housed at its Service Processing Center at 201 Varick Street in Manhattan's lower West Side.

The FBI's focus immediately after the attacks was whether any of the airplanes remaining in the air posed a threat. Once air traffic over the United States had ceased completely, the FBI turned its attention to locating those responsible for the terrorist attacks and preventing future attacks. During the evening of September 11, the FBI New York Field Office moved telephones, computers, facsimile machines, and other equipment into a temporary command post in a parking garage ___ ____ _____. In addition to the ____ _____ site, the FBI created command posts ___ ____ _____

* * * *

and appointed three INS District Directors to make detainee housing determinations based on input provided by the FBI. At this point, Pearson removed himself from this decision-making process.

INS Service Processing Centers process and detain illegal aliens who are awaiting disposition of their immigration cases or awaiting removal from the country. A detainee could be held at a Service Processing Center from one day to several years.

We were also told that some detainee housing determinations were made outside the process described above. Dan Molerio, Assistant District Director for Investigations in the INS New York District, said three Assistant U.S. Attorneys from the Southern District of New York detailed to the FBI Headquarters contacted him on a number of occasions and identified "high interest" detainees held by the INS in New York. Molerio said the FBI's Assistant Special Agent in Charge for Counterterrorism in New York also called him on several occasions about "high interest" detainees. Molerio said when the FBI told him a detainee was "high interest," he would ensure that the detainee was sent to the MDC.

In sum, even though the INS established a process for making housing determinations, the INS's decision was based almost entirely on the FBI's assessment.

C. BOP Confinement Decisions

Soon after the September 11 attacks, the BOP made several decisions regarding the detention conditions it would impose on the September 11 detainees. These decisions (discussed in more detail in Chapter 7) included housing the detainees in the administrative maximum (ADMAX) Special Housing Unit (SHU), implementing a communications blackout, and classifying the detainees as Witness Security (WITSEC) inmates. According to Michael Cooksey, the BOP's Assistant Director for Correctional Programs, the BOP decisions were based on the BOP's concerns about potential security risks posed by the September 11 detainees. He said the BOP made the decision to impose strict security conditions in part because the FBI provided so little information about

the detainees and because the BOP did not really know whom the detainees were. He said the BOP chose to err on the side of caution and treat the September 11 detainees as high-security detainees. He said that the Department was aware of the BOP's decision to house the September 11 detainees in high-security sections in various BOP facilities. Cooksey said the BOP did not treat the September 11 detainees different than "regular" high-security inmates.

BOP Director Kathy Hawk Sawyer told the OIG that officials in the Deputy Attorney General's Office contacted her to discuss specific detainees' ability to communicate with other inmates and with the outside world. She said she understood from these conversations that the Department wanted the

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CHAPTER SEVEN

CONDITIONS OF CONFINEMENT AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK

I. INTRODUCTION

Almost 60 percent of the 762 aliens detained in connection with the Government's investigation of the September 11 terrorist attacks were arrested in the New York City area. As discussed previously, the overwhelming majority of these aliens were arrested on immigration charges that, in a time and place other than New York City post-September 11, would have resulted in either no confinement at all or confinement in an INS or INS contract facility pending an immigration hearing. However, fear of additional terrorist attacks in New York City and

around the country changed the way aliens detained in connection with the investigation of the September 11 attacks were treated.

Aliens arrested by the INS on immigration charges who were deemed by the FBI to be of "high interest" to its terrorism investigation were held in high-security federal prisons across the country, such as the Federal Bureau of Prisons's (BOP) Metropolitan Detention Center (MDC) in Brooklyn, New York. Overall, the BOP confined 184 September 11 detainees in its facilities nationwide. A total of 84 detainees determined by the FBI to have a possible connection with the PENTTBOM investigation or terrorism in general were housed at the MDC from September 14, 2001, to August 27, 2002.

Generally, aliens deemed by the FBI to be "of interest" or "of undetermined interest" to the Government's terrorism investigation were detained in lower security facilities, such as the Passaic County Jail in Paterson, New Jersey (Passaic). From September 2001 to May 2002, 400 September 11 detainees were confined in Passaic.

This chapter examines the conditions of confinement for September 11 detainees held at the MDC, while the next chapter examines conditions experienced by September 11 detainees at Passaic. As we discuss in these two chapters, the FBI's initial assessment of its level of interest in specific September 11 detainees directly affected the detainees' conditions of confinement within the institution and

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The MDC is a 9-story BOP facility in Brooklyn that generally houses men and women either convicted of criminal offenses or awaiting trial or sentencing. On December 10, 2002, the MDC housed 2,441 men and 181 women.

their access to telephones, legal counsel, and their families.

In this chapter, we discuss the BOP's initial communications blackout after the terrorist attacks; its classification of September 11 detainees as "witness security" inmates; the MDC's administrative maximum (ADMAX) Special Housing Unit (SHU), a special high-security section of the facility where September 11 detainees were held until cleared by the FBI of involvement with terrorism; the MDC's process for transferring September 11 detainees from the ADMAX SHU to the facility's general population; the detainees' access to legal counsel; allegations of physical and verbal abuse made by detainees against MDC staff; and other condition of confinement issues, including consular visits, recreation opportunities, medical care, and lighting conditions in the ADMAX SHU cells.

II. INITIAL COMMUNICATIONS BLACKOUT AFTER SEPTEMBER 11

Immediately after the September 11 attacks, the BOP ordered all detainees who were "convicted of, charged with, associated with, or in any way linked to terrorist activities" to be placed in the highest level of restrictive detention. Also, MDC officials placed all incoming September 11 detainees in the ADMAX SHU without conducting the routine individualized assessment. BOP Director Kathy Hawk Sawyer told the OIG that this designation resulted from the FBI's assessment and was not the BOP's "call." Detainees held in the MDC's ADMAX SHU were subjected to the most restrictive conditions of confinement authorized by BOP policy, including "lockdown" for 23 hours a day, restrictive escort procedures for all movement outside of the ADMAX SHU cells, and

tight limits on the frequency and duration of legal telephone calls.

Hawk Sawyer told the OIG that the detainees were held under these restrictive detention conditions, in part because the BOP did not know who the detainees were or what security risks they might present to BOP staff and facilities. She said the policies applied to the September 11 detainees were not new policies created specially for the detainees. Rather, the policies were longstanding BOP practices for housing inmates who presented special security concerns. She noted that on any given day persons are detained by the BOP in conditions exactly like those applied to the September 11 detainees.

Hawk Sawyer informed the OIG that the Department did not initially give the BOP any guidance on how to confine the detainees. However, she said the Deputy Attorney General's Chief of Staff, David Laufman, and the Principal Associate Deputy Attorney General, Christopher Wray, called her during the weeks after September 11 with concerns about detainees' ability to communicate both with those outside the facility and with other inmates. Hawk Sawyer said she discussed specific September 11 detainees during these conversations as well as the detainees in general. Hawk Sawyer stated that Laufman's and Wray's concerns about the detainees' ability to communicate both with those outside the facility and with other inmates confirmed for her that the BOP's initial decision to restrict detainee communications with

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No. 07-827

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IN THE

Supreme Court of the United States

DENNIS HASTY, former Warden,

Petitioner,

v.

JAVAID IQBAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether plaintiffs in *Bivens* actions should be required to anticipate the affirmative defense of qualified immunity by meeting a heightened pleading requirement not required by the Federal Rules, contrary to this Court's longstanding precedent regarding both qualified immunity and liberal pleading standards.

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IN THE

Supreme Court of the United States

No. 07-827

DENNIS HASTY,
Petitioner,
v.
JAVAID IQBAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

Petitioner asks the Court to grant certiorari to decide whether a heightened pleading standard applies to complaints filed against supervisory officials in *Bivens*[1] lawsuits who invoke the qualified immunity defense.[2] Because this Court has rejected judicially-imposed heightened pleading standards, the Second Circuit correctly refused petitioner's invitation to apply a heightened pleading standard in this case. App. 162a-163a. Every appellate court that has considered the implication of the Supreme Court's recent decisions in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), and *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), has come

[1] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

[2] Although petitioner does not explicitly use the term "heightened pleading standard" in his statement of the question presented, his argument for a special pleading rule for *Bivens* defendants who assert a qualified immunity defense is subject to only one reasonable interpretation: requiring something more than simple notice pleading. Alternatively, to the extent that petitioner is asking this to Court review the Second Circuit's application of Rule 8's pleading requirements, the petition presents a fact-bound splitless question of error correction. *See infra* 22-26.

to the same conclusion. Petitioner does not even claim to identify a split of authority among the circuit courts regarding the question presented, and ultimately asks this Court to engage in fact-intensive error correction of the Second Circuit's application of Fed. R. Civ. P. 8's liberal pleading standard. Because this is an insufficient reason to grant the petition, because the Second Circuit's decision is correct, and because numerous factors make the instant case a poor vehicle for reaching the issues sought to be presented by petitioner, respondent respectfully requests that the petition be denied.

STATEMENT

1. Beginning in January 2002, respondent Javaid Iqbal was held for more than 150 days in a super maximum security unit on the ninth floor of Brooklyn, New York's Metropolitan Detention Center ("MDC") that was known as the "ADMAX SHU"—short for Administrative Maximum Special Housing Unit. Pursuant to policies adopted by petitioner and other officials after September 11, 2001, Mr. Iqbal was held in the ADMAX SHU without ever receiving a hearing or being told of the basis for his confinement there.[3] App. 17a, 20a (Compl. ¶¶ 81, 97.) Throughout this entire time, respondent was confined for twenty-three hours a day in an isolation cell. *Id.* 14a (Compl. ¶ 63.) He was subjected to strip and body-cavity searches each morning; additionally invasive body cavity searches were conducted both before, and again after, the rare occasions when he was permitted to leave his cell for court appearances, medical care, or non-contact visits with his attorney. *Id.* 14a, 28a-30a (Comp. ¶¶ 63, 137-48).) Correction officers beat him, humiliated him, taunted him with racial slurs, deliberately subjected him to uncomfortably hot and cold temperatures for

[3] Petitioner suggests that the actions taken against respondent were somehow an "extension" of the Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001). Pet. 3-4. This claim is not supported by anything in the record.

extended periods of time, prevented him from praying, confiscated his Koran, restrained him in shackles, chains, and manacles whenever he left his cell, and interfered with his communications with counsel. *Id.* 13a, 17a-19a, 23a-25a, 31a-34a (Compl. ¶¶ 60, 84, 87, 89, 113, 116-17, 120, 122, 153-54, 158, 168, 171.) The only reason respondent was confined on the ADMAX SHU was because of the discriminatory policies of petitioner and other defendants directed at Muslim men who were detained after September 11. *Id.* 20a (Compl. ¶ 96.)

Like all of the Muslim men of Arab or South Asian descent residing in the United States and swept up by the Government's investigation after September 11, Mr. Iqbal was eventually "cleared" of any involvement in terrorism and deported. Along with Ehab Elmaghraby,[4] Mr. Iqbal subsequently brought this lawsuit, seeking compensation for the central role that petitioner and other federal officials played in setting the terms, conditions, and extent of his confinement. By his First Amended Complaint dated September 30, 2004, Mr. Iqbal brought claims under *Bivens*, *supra*, for violations of his First, Fourth, Fifth, Sixth, and Eighth Amendment rights, as well as various statutory claims.

2. The complaint names individual defendants who crafted, directed, and implemented practices and procedures regarding the conditions and duration under which Mr. Iqbal was confined in the ADMAX SHU. Among these officers was petitioner, Warden Dennis Hasty, under whose immediate direction the ADMAX SHU was established shortly after September 11th. App. 12a-13a (Compl. ¶¶ 53–58.) The complaint also named individual correction officers and supervisors who had daily interactions with respondent, and several higher-ranking Department of Justice officials who together coordinated the investigation and detention initia-

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[4] On behalf of all defendants, the United States settled claims with Mr. Elmaghraby for $300,000 prior to the Second Circuit's decision.

tives under which Mr. Iqbal was apprehended and confined.[5] Despite petitioner's claim to the contrary, *see* Pet. 7, the complaint contains much more than mere "boilerplate" allegations regarding Warden Hasty.

Delegated to petitioner, for instance, was the critical task of establishing and staffing the ADMAX SHU. App. 13a (Compl. ¶¶ 57–58). Petitioner selected correctional officers and lieutenants he knew would impose, condone, and tolerate the punitive treatment of the September 11 detainees committed to their custody and care. *Id.* 25a, 30a, 32a, 34a (Compl. ¶¶ 125, 150, 161, 175.) Moreover, as a matter of policy, petitioner confined respondent in the ADMAX SHU—where he was kept in isolation, subjected to repeated strip and body cavity searches, prohibited from leaving his cell for more than one hour each day, housed in a cell with lights on almost 24 hours per day, and rarely permitted to exercise—for no legitimate penological purpose, and solely because of unlawful discrimination on the basis of race, religion, and national origin. *Id.* 17a-20a (Compl. ¶¶ 81-96.) It is specifically alleged that petitioner is one of the policy makers personally responsible for imposing these conditions on respondent. *Id.* 20a (Compl. ¶¶ 96–97.)[6]

With respect to petitioner's supervisory liability, the complaint makes numerous relevant allegations. Petitioner failed to implement policies to curtail the unconstitutional beatings of Mr. Iqbal and the extreme strip and body cavity

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[5] A number of these individuals have filed separate petitions for writs of certiorari. Docket Nos. 07-1015, 07-1150.

[6] While respondent need not rely on more than these allegations, it is noteworthy that relevant regulations issued by the Bureau of Prisons amply support the contention that petitioner, while Warden, was personally responsible for determining whether, for how long, and under what circumstances Mr. Iqbal was confined in the ADMAX SHU. *See* 28 C.F.R. §§ 524.10–524.12 (warden responsible for initial classification upon admission); *id.* § 541.22(b) (warden responsible for placing detainees in administrative segregation); *id.* § 541.22(c) (warden responsible for reviewing placement in administrative segregation); *id.* § 541.22(d) (warden sets conditions of administrative segregation).

searches experienced by respondent, failed to respond to complaints regarding interference with religious practice, and approved as a matter of policy the substantial restrictions on respondent's right to communicate with his criminal defense counsel. *Id.* 25a, 29a-30a, 32a, 34a-35a (Compl. ¶¶ 124-25, 148-50, 159-61, 173-75.) He was aware of and approved each of the unconstitutional policies and practices alleged in the complaint, yet took no steps to curb this unlawful conduct. *Id.*

3. Prior to engaging in discovery, in October, 2004, several defendants and petitioner filed separately briefed motions to dismiss respondent's complaint.[7] Among other arguments, the officials asserted that the complaint should be dismissed under Rule 12(b)(6) on ground of qualified immunity. On September 27, 2005, Judge John Gleeson, E.D.N.Y., disposed of each official's motion in an omnibus memorandum and order. *Id.* 63a-145a. While the court dismissed some of respondent's statutory claims, it permitted each of his *Bivens* claims to proceed against one or more of the moving officials. The court noted that "the post-September 11 context provides support for plaintiffs' assertions that defendants were involved in creating and/or implementing the detention policy under which plaintiffs were confined without due process." *Id.* 110a. Moreover, "some of the defendants, in disclaiming responsibility, suggest that other defendants (who also disclaim responsibility) were personally involved." *Id.* 112a. Reasoning that Mr. Iqbal "should not be penalized for failing to assert more facts" given that the extent of defendants' respective "involvement is peculiarly within their own knowledge," *id.*, the court concluded that the facts alleged in respondent's complaint were sufficient. Eight defendants then noticed appeals to the Second Circuit Court of Appeals.

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[7] Although discovery has been stayed against the defendants who are pursuing their motions to dismiss, discovery has continued against the remaining defendants.

4. A panel of the Second Circuit affirmed the district court's opinion in large part, holding that petitioner was entitled to proceed to discovery on the vast majority of his claims. *Id.* 146a-215a. Several aspects of the Second Circuit's opinion are pertinent to the petition. First, the Second Circuit interpreted this Court's decisions in *Leatherman*[8] and *Swierkiewicz* to mean what they said: "a court cannot impose a heightened pleading standard in *Bivens* (or other civil rights) actions against individual officers" absent authorization from a statute or the Federal Rules. App. 162a-163a. Second, it interpreted this Court's decision in *Bell Atlantic* to require a "flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Id.* 170a (emphasis in original). Third, to the extent that a defendant believes that *some* elements of a plaintiff's claim are based on "conclusory" allegations, the Second Circuit pointed to Fed. R. Civ. P. 12(e), consistent with this Court's suggestion in *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998).[9] App. 172a. Finally, the circuit court provided explicit guidance to the district court to oversee discovery with an eye towards preserving the substance of the qualified immunity defense. App. 172a-173a (suggesting that district court examine responses to interrogatories and requests to admit prior to permitting depositions, defer discovery of high level officials until other defendants have testified, and permit motions for summary judgment on qualified immunity grounds after "carefully targeted discovery" aimed at discovering the personal knowledge and involvement of individual defendants). Petitioner has to date refused

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[8] *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993).

[9] The Second Circuit did not find that any of the allegations made against petitioner were "conclusory." Indeed, the Second Circuit found that the allegations made against petitioner were sufficient on their own to establish plaintiff's entitlement to discovery. App. 188a, 194a, 195a-196a, 202a.

to avail himself of the opportunities presented by the Federal Rules, and amplified by the Second Circuit, to obtain further specification of the basis for the claims against him.

5. The longstanding rule, embodied by the Second Circuit's decision below, is that complaints filed in federal court need only meet the standards set forth in Rule 8, unless a statute calls for a higher pleading standard, or the plaintiff is alleging facts which fall into the particularized requirements of Fed. R. Civ. P. 9. *Leatherman*, 507 U.S. at 168-169; *Swierkiewicz*, 534 U.S. at 514-515; *Erickson v. Pardus*, 127 S. Ct. 2197 (2007) (per curiam). As this Court has emphasized numerous times, "[s]pecific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts." *Hill v. McDonough*, 547 U.S. 573, 582 (2006). In the absence of a specific heightened pleading requirement, "ordinary pleading rules are not meant to impose a great burden upon a plaintiff." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005). The Rule 8 standard is satisfied if a complaint gives "the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz*, 534 U.S. at 512 (internal quotation marks omitted). "Fair notice" is that which will enable the defendant to answer and prepare for trial. 5 Wright & Miller, Federal Practice & Proc. § 1215 (pleadings need to be detailed enough "to enable the defendant to respond"). In a garden variety negligence action, for example, it is sufficient to state that on a given date and a given place, "defendant negligently drove a motor vehicle against plaintiff." *Swierkiewicz*, 534 U.S. at 513 n.4 (*quoting* Form 9 of Federal Rules of Civil Procedure Forms). In the more closely analogous Title VII context, it is sufficient to allege that an adverse employment action was taken "on account of" prohibited factors. *Swierkiewicz*, 534 U.S. at 514. Thus, under Rule 8, a complaint need not identify the exact nature or mechanism of the defendant's misfeasance to state a claim.

6. A unanimous Supreme Court has consistently emphasized Rule 8's liberality while advising against misguided attempts to carve out particular causes of action for heightened pleading requirements. In *Leatherman* the Court rejected a Fifth Circuit rule requiring that complaints brought under 42 U.S.C. § 1983 ("Section 1983") against municipal corporations "state with factual detail and particularity the basis for the claim." 507 U.S. at 167. The Court declared this standard "impossible to square . . . with the liberal system of 'notice pleading' set up by the Federal Rules." *Id.* at 168.

7. A decade after *Leatherman*, the Court again unanimously struck down a heightened pleading standard originating in well-settled case law, this time as announced by the Second Circuit. [10] The Court cautioned that discovery and summary judgment, not heightened pleading requirements, are the proper means for disposal of unmeritorious suits. *Id.* at 512-513. In this connection the Court reiterated its previous admonition that a "requirement of greater specificity for particular claims," whatever the "practical merits," may be obtained only "by the process of amending the Federal Rules, and not by judicial interpretation." *Swierkiewicz*, 534 U.S. at 514-515 (internal quotation marks omitted); *see also Crawford-El*, 523 U.S. at 595 ("[O]ur cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process.").

8. Relying on *dicta* in *Crawford-El*, petitioner persists in arguing that every allegation against him must be pleaded via "specific, nonconclusory factual allegations." Pet. 13, 16. The Second Circuit correctly recognized *Swierkiewicz* to foreclose such an interpretation of the earlier *Crawford-El*

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[10] Specifically, *Swierkiewicz* reversed the Second Circuit's holding that a complaint alleging employment discrimination under Title VII of the Civil Rights Act of 1964 must set forth facts sufficient to establish a *prima facie* case as defined by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and progeny.

opinion. App. 162a. Indeed, *Crawford-El* plainly addressed the "burden of proof" by which a Section 1983 defendant's allegedly discriminatory intent must be shown, *Crawford-El*, 523 U.S. at 594, thus concerning itself not with any pleading requirement, but with the same type of question the Court expressly recognized in *Swierkiewicz* to be a wholly distinct matter. *See Swierkiewicz*, 534 U.S. at 510 (distinguishing between a minimal pleading standard and the proof necessary to establish a claim at trial). Even before *Swierkiewicz*, nearly every Court of Appeals to consider the matter had concluded that the Court's reasoning in *Crawford-El* required the rejection of judge-imposed heightened pleading standards. *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir. 2002) (collecting cases and noting that First Circuit was exception).

9. And after *Swierkiewicz*, no circuit court that has actually considered the decision has concluded that a heightened pleading standard is appropriate. *See Doe v. Cassel*, 403 F.3d 986, 989 & n.3 (8th Cir. 2005); *Alston v. Parker*, 363 F.3d 229, 233 (3d Cir. 2004); *Educadores Puertorriqueños en Acción v. Hernández*, 367 F.3d 61, 65, 66-67 (1st Cir. 2004); *Galbraith*, 307 F.3d at 1124-1125; *Goad v. Mitchell*, 297 F.3d 497, 501-505 (6th Cir. 2002);[11] *Thomson v. Washington*, 362 F.3d 969, 970-971 (7th Cir. 2004) (Posner, J.); *Trulock v. Freeh*, 275 F.3d 391, 405 (4th Cir.2001); *Currier v. Doran*, 242 F.3d 905, 916 (10th Cir. 2001); *see also Johnson v. Johnson*, 385 F.3d 503, 529 (5th Cir. 2004) (noting that Fifth Circuit's heightened pleading standard for qualified immunity cases had been overruled in 1995).

10. This Court's decision in *Bell Atlantic* does not change this analysis. First, *Bell Atlantic* reaffirmed *Swierkiewicz*, and with it the rejection of any heightened pleading standards imposed by judicial fiat. 127 S. Ct. at

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[11] Although petitioner fails to acknowledge it, *Goad* overruled the Sixth Circuit's decision in *Rippy v. Hattaway*, 270 F.3d 416 (6th Cir.2001), one of the decisions cited by petitioner in support of a heightened pleading standard. Pet. 8 n.7

1973-1974 & n.14. Second, rather than require detailed fact pleading, the Court simply held that the facts alleged, taken as true, have to plausibly suggest relief. *Id.* at 1964 (not requiring "detailed factual allegations"); *id.* at 1973 n.14. The court contrasted this with what it admitted was one extreme reading of some language from *Conley*, namely that a complaint could not be dismissed if a court could imagine any set of facts, whether alleged in the complaint or not, that could support the claims for relief. *Id.* at 1968-1969. Instead of leaving such matters to a court's imagination, after *Bell Atlantic* claims must be supported by facts alleged in the complaint, even if they may be proven by other facts developed through discovery. *Id.* at 1969. And where a complaint alleges facts that are consistent with both legal and illegal conduct, as did the complaint in *Bell Atlantic*, Rule 8 simply requires some additional allegation that pushes the complaint into the realm of "plausibility." *Id.* at 1972-1973; *Robbins v. Oklahoma*, -- F.3d --, 2008 WL 747132, *3 (10th Cir. 2008) (interpreting *Bell Atlantic* to have particular force where complaints allege facts that are consistent with both legal and illegal conduct). Thus, *Bell Atlantic* disclaimed any intention to radically alter the Rule 8 pleading standard; rather, it announced the retirement of a phrase from *Conley* that few lower courts had taken literally and that "is best forgotten as an incomplete, negative gloss on an accepted pleading standard." 127 S. Ct. at 1969.

11. That *Bell Atlantic* worked no significant change to Rule 8 pleading standards is evidenced by the Court's per curiam disposition of a prisoner's Section 1983 complaint in *Erickson*, *supra*. In *Erickson*, the lower court had dismissed a prisoner's Section 1983 claim for deliberate indifference to serious medical needs because the prisoner had failed to allege that he suffered any particular harm as a result of a denial of medical treatment. 127 S. Ct. at 2199. The Court reversed this disposition, finding that an allegation that the denial of care was endangering the prisoner's life was sufficient, without more, to state a claim. *Id.* at 2200. In so do-

ing, the Court reemphasized that such a contention, albeit lacking specifics, was not "too conclusory" to provide fair notice of the substance of the claim, that "[s]pecific facts are not necessary," and that all factual allegations in the complaint must be taken as true at the motion to dismiss stage. *Id.* (citing *Bell Atlantic* and *Swierkiewicz*). It goes without saying that, although a qualified immunity defense was available to the defendant in *Erickson*, the Court did not apply a different pleading standard in evaluating the complaint.

REASONS FOR DENYING THE PETITION

In seeking certiorari, petitioner argues, first, that there is "confusion" in the lower courts regarding the correct legal standard for reviewing *Bivens* complaints against which the defense of qualified immunity is raised and, second, that the Second Circuit's opinion conflicts with this Court's precedents concerning pleading requirements. Neither contention has any merit. There is no "confusion" in the lower courts regarding the appropriate standard of pleading in *Bivens* action– indeed, petitioner does not identify a plausible circuit split on this issue. No court has interpreted this Court's decision in *Bell Atlantic* to impose a heightened pleading standard in civil rights cases. *Infra* 18-21 & nn.17-22. Every circuit court has agreed that there is no conflict between *Bell Atlantic*'s holding that a plaintiff's entitlement to relief must be plausible based on the facts alleged in the complaint, and *Swierkiewicz*'s holding that heightened pleading standards may not be imposed by the judiciary absent some direction from the Federal Rules or through legislation. *Infra* 20. Contrary to petitioner's contention, the Courts of Appeals, in the short time since *Bell Atlantic* has been decided, are in remarkable unison regarding the scope and meaning of the decision.

Similarly, petitioner's claim that the Second Circuit misapplied relevant Supreme Court precedent is not a certworthy issue and finds no support in the decision below: plaintiff's

complaint contains well-pleaded factual allegations concerning petitioner's conduct. And consistent with this Court's admonition in *Crawford-El*, the Second Circuit suggested numerous limitations that the district court may impose on discovery, rather than impose a heightened pleading standard in this case. App. 172a-173a; *Crawford-El*, 523 U.S. at 597-598. Simply put, the Second Circuit carefully followed this Court's established precedent.

Even if the Court determined that the issues raised here warranted review in the abstract, this interlocutory appeal in particular is a poor vehicle to address the question presented. There are substantial questions regarding the Court's jurisdiction to reach the issue sought to be presented by petitioner. Moreover, even if the Court were to determine that the complaint's allegations provide insufficient notice to petitioner under the *Bell Atlantic* standard, ample facts have been uncovered through ongoing discovery to allow for a detailed amendment to the pleadings, as petitioner is well aware. Therefore, in this particular case, granting cert would only delay the case further to no apparent purpose.

I. THERE IS NO "CONFUSION" IN THE LOWER COURTS REGARDING THE QUESTION PRESENTED

The question sought to be presented by the petition is "Whether a supervisory official sued as an individual defendant in a *Bivens* action is entitled to qualified immunity when the plaintiff pleads only generalized and conclusory allegations in his complaint and asserts no specific facts as to that supervisory official." Pet (i). Nowhere does the petition, however, identify a split in the circuit courts regarding this question. Indeed, even this Court has only said that allegations in complaints may not be "too conclusory" to meet Rule 8's requirements. *Erickson*, 127 S. Ct. at 2200. This Court, while never specifically defining the meaning of "conclusory," has at least made it clear that the standard of nonconclusory allegations is easily satisfied. *Swierkiewicz*, 534 U.S.

at 513 n.4 (negligence complaint need only allege that a driver "negligently caused injury" at a particular time and place). In the Title VII context, analogous to the equal protection claims raised here, the Court has approved a complaint which does not even allege a *prima facie* case of discrimination, but simply states that an adverse employment action was taken "on account of" an employee's membership in a protected class. *Swierkiewicz*, 534 U.S. at 514. This Court has thus emphasized that a requirement of "factual detail and particularity" is inconsistent with Rule 8's requirements. *Leatherman*, 507 U.S. at 167.

Instead of identifying a split of authority as to the actual question presented—pleading standards in *Bivens* actions—petitioner suggests three possible arguments for the "confusion" regarding the applicable pleading standard in civil rights cases generally: first, according to petitioner, two district court cases and one unpublished Sixth Circuit decision suggest that *Swierkiewicz* did not completely invalidate heightened pleading standards in civil rights cases, Pet. 17; second, the Eleventh Circuit has applied a heightened pleading standard in civil rights cases in which qualified immunity is available as a defense, *id.*; and third, petitioner suggests that the Court's decision in *Crawford-El* is in tension with Rule 8's liberal pleading standard, *id.* at 13. Petitioner also makes the untenable suggestion that *Erickson* is somehow a source of "confusion," Pet. 18, but as established above (pp. 10-11, *supra*), *Erickson* repudiated any heightened pleading standard in civil rights cases.

The two district court cases and the unpublished Sixth Circuit case are cited by petitioner for the proposition that courts continued to apply "heightened pleading" language from *Crawford-El* after *Swierkiewicz*, suggesting that "the bare notice pleading standard in *Swierkiewicz* was not necessarily definitive for these types of cases." Pet. 16-17 (*citing Ruffin v. Nicely*, 183 Fed. Appx. 505, 510 n.1 (6th Cir. 2006); *Powers-Bunce v. District of Columbia*, 479 F. Supp. 2d 146, 158 (D.D.C. 2007); *Scott v. Garcia*, 370 F. Supp. 2d 1056,

1072 (S.D. Cal 2005). As for the district court cases, the existence of discordant district court authority concerning pleading standards is not a sufficient reason to grant certiorari. In any event, the district court cases cannot bear the weight petitioner places upon them. *Scott* is a decision on summary judgment; therefore, its citation to *Crawford-El* for the proposition that facts must be "specific" and "nonconclusory," 370 F. Supp. 2d at 1071-1072, has no application in the motion to dismiss context. And *Powers-Bunce*, while involving motions to dismiss by multiple defendants, is entirely consistent with the Second Circuit's decision in the instant case: although the plaintiff argued to the court that there had been a beating which led to her son's death, the complaint did not even allege that a beating occurred, nor did it claim that the named defendants had anything to do with the beating. 479 F. Supp. 2d at 154-155. Instead of dismissing the complaint, however, the court reconciled the competing interests of Rule 8 and qualified immunity by treating the motions to dismiss as motions for a more definite statement under Rule 12(e), and provided the plaintiff the opportunity to replead because civil rights plaintiffs are typically at an informational disadvantage. *Id.* at 158-159. The option of using Rule 12(e) to balance qualified immunity against Rule 8's liberal pleading standard was specifically adverted to by the *Crawford-El* Court, and the Second Circuit referred to it as an option for petitioner, App. 172a, yet he has never taken the opportunity to seek such a remedy.[12]

Ruffin, the unpublished Sixth Circuit case cited by petitioner, offers no support for the position advanced by peti-

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[12] This is likely because the several months of discovery that has been ongoing has revealed overwhelming evidence of petitioner's knowledge of and involvement in the treatment of respondent and other ADMAX SHU detainees. Petitioner no doubt is aware that were he to seek relief under Rule 12(e), respondent would be able to provide specific factual support for most of his allegations. This is not to say that discovery regarding petitioner's involvement is close to complete, in large part because petitioner was granted a stay of any discovery directed against him during the pendency of the instant petition.

tioner here. First, the court declined to dismiss a civil rights complaint under a heightened pleading standard. 183 Fed. Appx. at 510 n.1 (internal quotation marks omitted). Indeed, in a portion of the opinion not cited by petitioner, the Sixth Circuit extended *Swierkiewicz*'s holding to all theories of relief, not just Title VII claims. 183 Fed. Appx. at 513. Moreover, post-*Ruffin* Sixth Circuit cases have expressed no disagreement with *Iqbal*, *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 540-542 (6th Cir. 2007) (noting that almost all district courts in the circuit were in conformity with *Iqbal*), and have read *Bell Atlantic* to require something more that "labels and conclusions" but not "detailed" facts, *United States ex rel. Bledsoe v. Community Health Systems, Inc.*, 501 F.3d 493, 502 (6th Cir. 2007) (internal quotation marks omitted). Importantly, prior to *Bell Atlantic* the Sixth Circuit had interpreted *Swierkiewicz* to require the abandonment of any heightened pleading standard in civil rights cases in which qualified immunity is invoked. *Goad*, 297 F.3d at 501-505. And after *Bell Atlantic*, the Sixth Circuit has concluded that *Swierkiewicz*'s force remains unchanged, especially in light of *Erickson*. *Lindsay v. Yates*, 498 F.3d 434, 439-440 & n.6 (6th Cir. 2007). Therefore, there is no basis for questioning the continuing vitality of the Sixth Circuit's holding that *Swierkiewicz* leaves no room for a heightened pleading standard in cases in which qualified immunity is raised.

Petitioner also makes reference to an Eleventh Circuit case, *Gonzalez v. Reno*, 325 F.3d 1228, 1235 (11th Cir. 2003), arguing that it shows that even after *Swierkiewicz*, at least one circuit court applied a heightened pleading standard in *Bivens* actions.[13] Pet. 17. To the extent *Gonzalez* suggests tension between the Eleventh Circuit and its sister courts, however, it has not been meaningfully developed for several reasons. *Gonzalez* was briefed and argued prior to this Court's decision in *Swierkiewicz*, and the court did not cite

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[13] Despite petitioner's claim that the issue presented is one of national importance, this is the only circuit court case that petitioner cites that involves a *Bivens* defendant.

Swierkiewicz, let alone address whether it could be squared with a heightened pleading standard in civil rights cases. Since *Gonzalez* was decided, the Eleventh Circuit has neither cited *Swierkiewicz*, nor discussed its impact in cases in which a "heightened pleading" standard was applied. *Epps v. Watson*, 492 F.3d 1240 (11th Cir. 2007); *Swann v. Southern Health Partners, Inc.*, 388 F.3d 834 (11th Cir. 2004); *Osburn v. Cox*, 369 F.3d 1283 (11th Cir. 2004); *Omar ex rel. Cannon v. Lindsey*, 334 F.3d 1246 (11th Cir. 2003); *Dalrymple v. Reno*, 334 F.3d 991 (11th Cir. 2003); *Cottone v. Jenne*, 326 F.3d 1352, 1362 n.7 (11th Cir. 2003). By contrast, every circuit court of appeals to discuss *Swierkiewicz* in the context of pleading standards has concluded that a heightened pleading standard is inappropriate. *Supra* 9; *infra* 20-21. Thus, to the extent the Eleventh Circuit has applied a heightened pleading standard in civil rights cases, it has not yet been forced to address the meaning of *Swierkiewicz* and, more importantly, *Erickson*, as they relate to a heightened pleading requirement.[14] There is thus no support for petitioner's contention that the Eleventh Circuit has, contrary to other circuits, read *Swierkiewicz* to permit application of a heightened pleading standard in cases in which qualified immunity has been raised; the Eleventh Circuit has not given *any* interpretation to *Swierkiewicz* or *Erickson* in the context of heightened pleading standards.

Nor, contrary to petitioner's contention, does the Court's decision in *Crawford-El* offer any support for the question presented here. In *Crawford-El*, the Court addressed and forcefully rejected a judicially-created heightened burden of proof that had been imposed on civil rights plaintiffs in which the motive of the defendant was an element of the cause of action. 523 U.S. at 592-594. The Court's analysis only buttresses the widespread rejection of heightened pleading standards. The Court emphasized that it had consistently "declined similar invitations to revise established rules that

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[14] The Eleventh Circuit has yet to issue an opinion, published or unpublished, which cites or discusses *Erickson*.

are separate from the qualified immunity defense," including invitations to change the Federal Rules governing pleading by requiring the plaintiff to anticipate the immunity defense." *Id.* at 595. And in a portion of the case that petitioner only selectively quotes from, the *Crawford-El* Court stated in *dicta*:

> When a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense. It must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings. The district judge has two primary options prior to permitting any discovery at all. First, the court may order a reply to the defendant's or a third party's answer under Federal Rules of Civil Procedure 7(a), or grant the defendant's motion for a more definite statement under Rule 12(e). Thus, the court may insist that the plaintiff put forward specific, nonconclusory factual allegations that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment.

Id. at 597-598 (internal quotation marks omitted)

Petitioner only quotes the portion of the opinion which refers to the district court's power to require the plaintiff to put forward "specific, nonconclusory factual allegations." Pet 13, 15-16. But petitioner neglects to discuss the context in which this comment was made; that is, where a district court either exercises its discretion to order a reply to a defendant's answer, or to grant a defendant's motion for a more

definite statement under Rule 12(e). Here, defendant neither answered the complaint nor moved for a more definite statement. Therefore, the district court had no authority under *Crawford-El* to insist on more "specific" factual allegations. Petitioner's contrary contention, implying that plaintiff should have anticipated petitioner's invocation of the *affirmative defense* of qualified immunity at the time of filing, is contrary to *Gomez v. Toledo*, 446 U.S. 635, 640 (1980), which *Crawford-El* cited approvingly for the proposition that the Court will not alter the pleading requirements of the Federal Rules to require a plaintiff to anticipate an immunity defense. 523 U.S. at 595. The Court's unanimous decision in a prison conditions case, *Jones v. Bock*, 127 S. Ct. 910, 921 (2007), recently confirmed this general rule. *Jones* held that because failure to exhaust administrative remedies is an affirmative defense, prisoners need not anticipate the defense and plead their compliance with exhaustion requirements in order to meet Rule 8's pleading requirements.[15] *Id.* Thus, petitioner's argument that qualified immunity triggers a heightened pleading requirement is directly contradicted by the Court's decision in *Crawford-El* and by the Court's general rule regarding affirmative defenses.[16]

Finally, petitioner claims that *Bell Atlantic* has created a "scramble" among lower courts trying to interpret what it means for pleading requirements. Pet. 17. Read closely, however, even petitioner acknowledges that the circuit courts

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[15] Of course, there were substantial policy arguments in favor of requiring affirmative pleading of exhaustion by prisoner plaintiffs. *Jones*, 127 S. Ct. at 920-921. But the Court confirmed the general rule that specific pleading requirements are not to be imposed through "case-by-case determinations of the federal courts." *Id.* at 919-920.

[16] If civil rights plaintiffs were required to anticipate the availability of a qualified immunity defense in civil rights cases, there would be some difficulty in even predicting whether a particular defendant will be entitled to invoke the defense as a general matter. *Richardson v. McKnight*, 521 U.S. 399 (1997) (applying case-by-case analysis to determine whether private entities acting "under color of" state law are entitled to qualified immunity in Section 1983 suits).

agree that *Bell Atlantic* reinforces *Swierkiewicz*, while only district courts have suggested that *Bell Atlantic* has "significantly change[d]" Rule 8's pleading requirement. Pet. 17-18 & n.10. Ultimately, the only circuit court authority that petitioner can cite for the proposition that lower courts are confused about *Bell Atlantic* is Judge Cabranes' concurring opinion in *Iqbal*. Pet. 19. But Judge Cabranes himself opined that the decision below is fully consistent with this Court's precedents. App. 213a. In fact, there is little if any confusion among the circuit courts as to *Bell Atlantic*'s meaning and scope. The Second Circuit maintains its adherence to *Iqbal*, in a variety of contexts. *E.g.*, *ATSI Communications, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 n.2 (2d Cir. 2007) (reaffirming *Iqbal*'s holding that *Bell Atlantic* applies beyond antitrust context). And those circuits that have discussed *Iqbal* have done so with approval. *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (citing *Iqbal* without disagreement); *Weisbarth*, 499 F.3d at 540-542 (noting that almost all district courts in the circuit had agreed with *Iqbal*'s "close[] analy[sis]" of *Bell Atlantic*);[17] *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 n.2 (10th Cir. 2007).[18] Even the Eleventh Circuit has interpreted *Bell Atlantic*, in a civil rights

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[17] That there may be one district court in the Sixth Circuit which has limited *Bell Atlantic* to the antitrust context is of no moment, in terms of showing a circuit split.

[18] Those courts that have not explicitly discussed *Iqbal* have come to the same conclusion as the Second Circuit that *Bell Atlantic* applies to a wide range of subject matters. *Giarratano v. Johnson*, -- F.3d --, 2008 WL 771503, *3-5 (4th Cir. 2008) (Section 1983 claim); *Kozikowski v. Commissioner of Internal Revenue*, No 07-1281, 2007 WL 3377146, *1 (8th Cir. 2007) (per curiam) (unpub. op.) (tax court action); *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008) (question of personal jurisdiction); *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (challenge to arbitration decision); *Ellibee v. Fox*, 244 Fed. Appx. 839, 843, 2007 WL 1776347 (10th Cir. 2007) (per curiam) (unpub. op.) (Section 1983 claim).

case, in accord with *Iqbal*. *See Watts v. Florida Intern. University*, 495 F.3d 1289, 1295-1296 (11th Cir. 2007).[19]

Not only is every circuit in agreement concerning the scope of *Bell Atlantic*, but every circuit to consider the question has concluded that *Bell Atlantic* did nothing to undermine the holding of *Swierkiewicz* and its predecessors that a heightened pleading standard cannot be imposed absent changes in the Federal Rules or amendment of statutes upon which particular claims are based. *Phillips*, 499 F.3d at 233 ("The Court emphasized throughout its opinion that it was neither demanding a heightened pleading of specifics nor imposing a probability requirement."); *Burnette v. Bureau of Prisons*, No. 06-30540, 2007 WL 4328808, *1 (5th Cir. 2007) (per curiam) (unpub. op.) (in a *Bivens* lawsuit, citing *Twombly* for "plausibility" standard but not interpreting it as a heightened pleading standard); *United States ex rel. Bledsoe*, 501 F.3d at 502 (not requiring detailed facts under *Bell Atlantic*); *Lindsay*, 498 F.3d at 439-440 &n.6 (noting that, because the majority in *Bell Atlantic* expressed no desire to overturn *Swierkiewicz*, it was still good law, especially in light of *Erickson*);[20] *Limestone Development Corp. v. Village*

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[19] In *Watts*, the court held that *Bell Atlantic*'s plausibility standard applied to a Section 1983 claim based on religious discrimination, 495 F.3d at 1295-96, but also held that an allegation that an adverse employment action constituted a "substantial burden on the exercise of [plaintiff's] religious beliefs" was a factual allegation to be taken as true and one of the facts sufficient to render plausible plaintiff's claim that he was terminated for his sincerely held religious belief. Petitioner would no doubt consider an allegation that particular conduct constituted a "substantial burden" to be a "conclusory" allegation, because it is in essence a legal conclusion. Pet. 23 (arguing that complaint only adverts to "legal standards").

[20] The Sixth Circuit's analysis suggests that *Bell Atlantic* has changed little regarding its pleading standard, because even before *Bell Atlantic* courts in the Sixth Circuit did not need to "accept the plaintiff's legal conclusions or unwarranted factual inferences as true." *Commercial Money Center, Inc. v. Illinois Union Ins. Co.*, 508 F.3d 327, 336 (6th Cir. 2007). Nonetheless, in the discrimination context, the Sixth Circuit maintains the consensus rule that discriminatory animus, consistent with Fed.

of Lemont, Ill., -- F.3d --, 2008 WL 852586, *4-5 (7th Cir. 2008) (describing *Bell Atlantic* as rejecting the "old formula-that the complaint must not be dismissed unless it is beyond doubt without merit", but declining to "overread" *Bell Atlantic* in light of *Erickson*);[21] *Mendiondo v. Centinela Hosp. Medical Center*, -- F.3d --, 2008 WL 852186, *4 (9th Cir. 2008) (holding that a complaint "need not contain detailed factual allegations"); *Skaff v. Meridien North America Beverly Hills, LLC*, 506 F.3d 832, 841-42 (9th Cir. 2007) (interpreting *Bell Atlantic* and *Swierkiewicz* as consistent with the Supreme Court's "repeated[] instruct[ion] . . . not to impose . . . heightened pleading standards in the absence of an explicit requirement in a statute or federal rule"); *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1163 (10th Cir. 2007) (in Section 1983 case, describing lesson of *Erickson*, *Bell Atlantic*, and *Swierkiewicz* as ensuring the defendant have "sufficient notice to begin preparing its defense and the court sufficient clarity to adjudicate the merits"); *Robbins*, 2008 WL 747132 at *3-4 (rejecting heightened pleading standard in Section 1983 claims that implicate qualified immunity).

Thus, despite *Bell Atlantic*'s brief provenance, the circuit courts appear to be near consensus regarding its scope and meaning. While some circuit courts have adverted to uncertainty regarding the decision's scope, *e.g.*, *Commercial Money Center,* 508 F.3d at 337 n.4, *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 188 n.7 (4th Cir. 2007), in those cases the court has found it unnecessary to definitively resolve the issue.[22] It is premature to predict that differences over the meaning and scope of *Bell* Atlantic will emerge after such a

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R. Civ. P. 9, can be alleged generally. *Lindsay*, 498 F.3d at 440.

[21] The Seventh Circuit had initially expressed doubt that *Bell Atlantic* changed the pleading standard, contrasting its view with the view of the *Iqbal* court, *Equal Employment Opportunity Commission v. Concentra Health Servs., Inc.*, 496 F.3d 773, 782 n.4 (7th Cir. 2007).

[22] And the Fourth Circuit, at least, has subsequently expanded *Bell Atlantic*'s reach beyond the antitrust context. *Giarratano*, 2008 WL 771503 at *3-5.

brief time frame. This Court itself has shown no difficulty in resolving such questions, as exemplified by *Erickson*. If anything, the Court's decision in *Erickson* suggests the need to await further percolation amongst the lower courts before concluding that there is any confusion about the pleading standard enunciated in *Bell Atlantic*.

In short, petitioner has failed to identify any meaningful split of authority regarding the question he presents to this Court, has failed to show any dispute amongst the circuit courts as to the meaning of *Bell Atlantic*, and has failed to show that the heightened pleading standard he requests is consistent with this Court's prior decisions regarding either Rule 8's requirements or the principles of qualified immunity. Under these circumstances, certiorari should be denied.

II. THE PETITION ASKS THIS COURT TO ENGAGE IN FACT-BOUND ERROR-CORRECTION

In the absence of support for a heightened pleading standard, petitioner can only argue that the Second Circuit erred in applying *Bell Atlantic* to the complaint in this case. Pet. 26 (stating that it was "error" for Second Circuit to find plaintiff's complaint satisfied Rule 8 and that Court should grant certiorari "to correct this error"). This Court, however, does not typically engage in error-correction, especially the fact-intensive interlocutory error-correction that petitioner requests here.

Petitioner focuses his argument that respondent's allegations are insufficient solely on respondent's excessive force and conspiracy claims. Pet. 21-26. Petitioner fails to make any argument that the Second Circuit erred in reviewing respondent's claims under the Equal Protection Clause and the First, Fourth, and Sixth Amendments. Thus, not only has petitioner made an argument based on error correction, but he has not even attempted to make his argument reach all of the claims that remain. This alone counsels against granting the petition.

Most importantly, though, petitioner never clarifies what he means by "conclusory" allegations. At times he appears to argue that bare allegations of knowledge are "conclusory," Pet. 23, but Rule 9 counsels otherwise. Fed. R. Civ. P. 9(b) (knowledge "may be alleged generally"). Similarly, the Rules specifically provide that allegations as to discriminatory intent are to be alleged generally and not with any specificity. *Id.* The Rules also specifically permit plaintiffs to allege alternative hypothetical claims for relief, permitting allegations regarding knowledge and intent to be alleged against multiple defendants, Fed. R. Civ. P. 8(d), especially here, where the lower courts have specifically found that the defendants have pointed fingers at each other in disclaiming responsibility for the treatment received by respondent. App. 112a. At this stage of the proceeding, with the profound informational asymmetry present in a case like this, petitioner's proposal would require respondent to have access to substantial pre-filing discovery to file a sufficiently pleaded complaint.

In any event, whatever one's definition of "conclusory," respondent's complaint gives "fair notice" of the grounds for his claims against petitioner. Petitioner simply mischaracterizes plaintiff's complaint when he argues that the complaint contains "nothing but vague and factually unsupported allusions to legal standards." Pet. 23. The complaint makes numerous detailed allegations regarding the conditions imposed on the ADMAX SHU, alleges that petitioner was aware of and approved of these conditions, and that petitioner never took any steps to remedy the conditions. *Supra* 4-5; App. 6a, 13a, 25a, 27a, 29a-32a, 34a (Compl. ¶¶ 17, 57-58, 124-25, 134, 148-50, 153-54, 158-61, 174-75.) And plaintiff alleges that the petitioner, among others, established and carried out a policy of confining Mr. Iqbal in the ADMAX SHU for no legitimate reason, and solely because of his race, religion, and national origin. App. 20a (Compl. ¶¶ 96-97); *see also* 28 C.F.R. § 541.22 (Warden responsible for placing inmates in confinement in the ADMAX SHU for punitive reasons). As

the Second Circuit found, the complaint establishes the plausibility of respondent's claims regarding petitioner's personal involvement in these matters in particular "without allegations of additional subsidiary facts." App. 188a, 194a, 195a-196a, 202a. In so doing, the Second Circuit relied on more than just the fact that petitioner was the Warden of the facility. The court cited to numerous facts alleged in the complaint, including that petitioner (1) knew of respondent's continued detention in the ADMAX SHU absent procedural protections, App. 187a, (2) requested that certain officials develop procedures for the unit, knew of the conditions present on the unit, approved of the policies applied on the unit, and knew of the custom of beating detainees on the unit, App. 194a, (3) chose the officers on the unit, App. 195a, and (4) that petitioner's responsibility with respect to religious freedom was established by the complaint and relevant federal regulation, App. 202a.[23]

One wonders what particular facts petitioner believes must be alleged in order to survive a motion to dismiss. Here, respondent has alleged the animus, knowledge, and intent sufficient to establish that petitioner's conduct was unconstitutional, allegations which Rule 9(b) allows to be averred generally. Petitioner's principal complaint appears to be that respondent did not allege with specificity when and how he became aware of his subordinates' unconstitutional beatings of respondent, and when and where he agreed to deprive respondent of his constitutional rights. Pet. 24-26. This is not a complaint that amounts to a Rule 8 problem,

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[23] Petitioner had claimed that the regulations establish the chaplain's responsibility for religious activities in the facility, but as respondent pointed out, in fact the relevant regulations vest relevant discretion in the Warden. 28 C.F.R. § 548.10(b) (warden has authority to "limit attendance at or discontinue a religious activity"); *id.* § 548.15 (warden determines whether attendance at religious activity is open to all prisoners); *id.* § 548.16 (Warden determines what religious property may be used or possessed by prisoners). These regulations make more than "plausible" plaintiff's allegations of petitioner's involvement in the restrictions on religious freedom in the ADMAX SHU.

however. Petitioner has not shown that he cannot answer the complaint as it is written; either he was or was not aware that his subordinates beat ADMAX SHU detainees, subjected respondent to strip and body cavity searches, and so on, or he was not. Similarly, if petitioner claims that he did not agree with anyone to violate respondent's constitutional rights, he can deny those allegations.

Petitioner's related complaint that some of respondent's factual allegations regarding supervisory liability reflect the legal standard for establishing that claim is of no moment. Pet. 23. Petitioner is on no less notice than the hypothetical negligence defendant who has to respond to the allegation that he "negligently" injured another person, or the hypothetical Title VII defendant who has to respond to the allegation that he fired someone "on account" of protected status. *Swierkiewicz*, 534 U.S. at 513-514 & n.4. In both of those examples, the factual allegation deemed sufficient by the Court mirrored the legal standard for liability. And here, respondent has alleged more facts than just the bare legal standard, and un like *Bell Atlantic*, petitioner cannot argue that the facts alleged in respondent's complaint are consistent in any way with otherwise lawful conduct. In this circumstance, the complaint easily exceeds the threshold of plausibility. This is especially the case given the civil rights context in which this complaint was filed, in which the informational asymmetry is profound. This informational disadvantage is manifest in this case, where the defendants on appeal – as in the district court – sounded an inharmonious chorus of disavowal, each seeking to lay on another the responsibility for the treatment of Mr. Iqbal over the year following September 11, 2001. Petitioner, for instance, argued alternatively that his subordinates were entirely responsible for plaintiff's confinement in the ADMAX SHU (Hasty Appellate Br. 42 (referring to role of Segregation Review Officials)), or that his superiors bear responsibility (*id.* 43-44 (referring to role of his co-defendants on appeal).)

In the courts below, petitioner had no difficulty identifying the legal claims and factual bases for those claims in arguing that he was entitled to qualified immunity. For he argued both that the law governing respondent's claims was not "clearly established," and that his behavior, as alleged in the complaint, was reasonable under the circumstances. Petitioner does not explain how the complaint could both give insufficient notice of the factual basis for respondent's claims, while providing enough factual detail for petitioner to argue that he behaved reasonably under the circumstances. As both the Second Circuit and district court found, the complaint provides ample factual support for petitioner to prepare a defense and to understand the basis for respondent's claims. Nothing more is required.

III. Even If The Question Presented Were Certworthy, This Case, In Its Current Posture, Is A Bad Vehicle

Even were the Court inclined to grant certiorari on the question presented, this case is a poor vehicle for addressing the issue. First, there is a substantial question as to whether there is even jurisdiction to consider the question presented. Interlocutory appeals, although disfavored, are permitted in limited circumstances for appeals of the denial of a motion to dismiss or for summary judgment asserting the defense of qualified immunity, as an iteration of the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). Not every denial of qualified immunity is subject to interlocutory appeal, however. *Johnson v. Jones*, 515 U.S. 304, 314 (1995). The exception for interlocutory appeals of qualified immunity decisions permits appellate courts to decide abstract issues of law, "typically, the issue whether the federal right allegedly infringed was 'clearly established.'" *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996). When bringing such an appeal, however, the defendant must accept the

plaintiff's version of the facts as presented in the district court, for in those circumstances, the appellate court can review the district court's determination of the "purely legal issue what law was 'clearly established,'" and need not consider the correctness of the plaintiff's version of the facts. *Johnson*, 515 U.S. at 313. Here, petitioner petitioner is not arguing that the law was not "clearly established," but has instead refused to accept the facts alleged in plaintiff's complaint as true for the purposes of his appeal. Moreover, because the right to an interlocutory appeal is limited to the legal issue of qualified immunity, there is no jurisdiction to review petitioner's claims that respondent has failed to allege a cause of action under 42 U.S.C. § 1985(3). *Swint v. Chambers County Comm'n*, 514 U.S. 35, 51 (1995) (supplemental interlocutory jurisdiction disfavored).

Relatedly, because of the interlocutory nature of this appeal, granting certiorari would be premature. Consistent with this Court's admonition in *Crawford-El*, the Second Circuit remanded to the district court to permit limited discovery regarding the qualified immunity defense raised by petitioner, among others. App. 172a-173a. The purpose of so doing was to protect petitioner and his co-defendants from the "broad-reaching" discovery with which *Harlow* was concerned. *Crawford*-El, 523 U.S. at 593 n.14 (noting that an assertion of qualified immunity did not foreclose all discovery). Therefore, contrary to petitioner's suggestion, he has yet to be confronted with answering discovery that undermines the interests behind the qualified immunity defense. *Id.* (suggesting that permitting discovery necessary to decide a motion for summary judgment based on qualified immunity would not undermine the purpose of the immunity). Indeed, the court of appeals envisioned a reasonable progression of discovery, from limited written discovery on targeted inquiries as to the qualified immunity issues before even depositions were permitted of defendants like the petitioner.

Finally, perhaps most importantly, even if the Court grants certiorari here and ultimately disagrees with the Sec-

ond Circuit's assessment of the complaint, respondent will have no difficulty amending his complaint to allege facts that meet a "heightened" standard. Since the complaint was filed, respondent has obtained discovery from the United States and other defendants that confirms the principal role that petitioner played in the unconstitutional conditions of confinement experienced by respondent. If this Court finds that *Bell Atlantic* enunciates a new pleading standard that was not satisfied by the complaint in the instant case, such amendment will be both proper and sufficient to meet whatever standard of pleading is expected of a plaintiff at this prediscovery stage.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for certiorari.

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APRIL 2008

No. 07-827

In the Supreme Court of the United States

DENNIS HASTY, FORMER WARDEN, PETITIONER

v.

JAVAID IQBAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS JOHN D. ASHCROFT AND ROBERT MUELLER

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STATEMENT

The decision of the United States Court of Appeals for the Second Circuit at issue in this petition is also the subject of a separate petition for a writ of certiorari filed on behalf of John D. Ashcroft, former Attorney General of the United States, and Robert Mueller, Director of the Federal Bureau of Investigation, who, like petitioner Hasty in this case, were each defendants-appellants in the court of appeals. See *Ashcroft* v. *Iqbal*, petition for cert. pending, No. 07-1015 (filed Feb. 6, 2008).

The facts and procedural background of this case are summarized (at 2-8) in the petition in No. 07-1015.

ARGUMENT

1. The question presented by petitioner—the warden for the detention center where respondent Iqbal

was held during the period at issue—overlaps with the first question presented in No. 07-1015, concerning whether or in what circumstances conclusory allegations may state a claim under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against supervisory officials with no direct involvement in alleged constitutional violations by others. As explained in the petition in No. 07-1015 (at 11-24), that question warrants this Court's review.

The Court may wish to consider that important question from the standpoint of high-ranking officials like the Attorney General and the Director of the FBI (*i.e.*, the petitioners in No. 07-1015) as well as the lower-level supervisors like the warden of a detention facility (*i.e.*, petitioner Hasty). At a minimum, however, the question warrants review with respect to claims that are directed against high-ranking officials like the Attorney General and the Director of the FBI, who could easily be added to *Bivens* complaints on the basis of a conclusory allegation that they "knew of or condoned" actions by others, which, in turn, could subject such high-ranking officials to the prospect of discovery, as petitioners Ashcroft and Mueller now face here, and thereby disrupt critical government operations—in conflict with this Court's precedents and the vital principles underlying the doctrine of qualified immunity. See Pet. at 21-24, *Ashcroft* v. *Iqbal*, *supra* (No. 07-1015).

Judge Cabranes underscored in his separate opinion the unique institutional concerns presented by allowing such claims to proceed on the basis of conclusory allegations against such high-ranking officials. See, *e.g.*, Pet. App. 214a-215a; see also *id.* at 188a (court of appeals opinion; contrasting "Hasty and the mid-level Defendants" with "Ashcroft and Mueller," whom it called "se-

nior officials of the Department of Justice"). As Judge Cabranes explained, "[e]ven with the discovery safeguards carefully laid out in Judge Newman's opinion, it seems that little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit to require officials charged with protecting our nation from future attacks to submit to prolonged and vexatious discovery processes." *Id.* at 214a-215a. The amici former Attorneys General and FBI Directors have likewise demonstrated the added concerns and disruptive effects that the decision below threatens for high-ranking government officials. Barr Amicus Br. at 10-14, *Ashcroft* v. *Iqbal*, *supra* (No. 07-1015).

2. The petition in No. 07-1015 also presents an additional question—not presented by petitioner Hasty and implicating a clear circuit split—on whether actual knowledge, as opposed to constructive knowledge, of the actions of subordinates is necessary for the imposition of supervisory liability in a *Bivens* action. See Pet. at 25-33, *Ashcroft* v. *Iqbal*, *supra* (No. 07-1015). As explained in the petition in No. 07-1015, that question is also of substantial importance and independently warrants certiorari. See also Barr Amicus Br. at 20-24, *Ashcroft* v. *Iqbal*, *supra* (No. 07-1015). Indeed, by exposing supervisory officials to liability based on a constructive notice theory, the Second Circuit's decision in this case inappropriately expands the inferred *Bivens* cause of action to encompass something approaching *respondeat superior* liability, which this Court itself has rejected in the analogous context of Section 1983 actions. See Pet. at 28, 32, *Ashcroft* v. *Iqbal*, *supra* (No. 07-1015). The combined effect of the Second Circuit's broad conception of

supervisory liability under *Bivens* and its lenient pleading standard poses a serious threat to the ability of high-ranking officials to carry out their duties and therefore warrants this Court's review.

CONCLUSION

For the foregoing reasons, the Court should, at a minimum, grant a writ of certiorari in No. 07-1015. If the Court wishes to consider the sufficiency of conclusory allegations against a broader range of governmental defendants, it should also grant a writ of certiorari in No. 07-827. Otherwise, the petition for certiorari in No. 07-827 should be held pending the disposition of No. 07-1015.

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

Respondent's Brief in Opposition to the Petition for a Writ of Certiorari merits only a brief reply.

1. In response to Petitioner Dennis Hasty's assertions of qualified immunity, Respondent has asserted repeatedly, both in the lower courts and now in this Court, that Hasty is advocating an impermissible "heightened pleading standard" that conflicts with the pleading requirements under Rule 8(a) of the Federal Rules of Civil Procedure. Indeed, that is Respondent's opening salvo in his opposition, yet it is simply incorrect. Hasty has repeatedly affirmed throughout this case that he is not advocating a "heightened pleading standard."

Rather, Hasty argues that he is entitled to qualified immunity from suit because of the way the claims against him are structured by the Respondent in his First Amended Complaint. As Hasty outlines in his petition, the claims against him are conclusory, devoid of factual detail, and routinely framed in terms of what the Respondent says Hasty "knew or should have known" as warden of the Metropolitan Detention Center ("MDC") in New York. These are precisely the types of allegations that this Court condemned in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007), when it held that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Indeed, Rule 8(a) requires that Respondent's complaint makes a "showing" of his entitlement to relief, and it is this standard—as clarified by *Twombly*—that he fails to meet.

In addition, this Court has addressed the qualified immunity defense on numerous occasions and has long held that it must be properly applied so that federal officials can perform their official responsibilities without fear of being held personally liable. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 816-18 (1982); *Mitchell v. Forsyth*, 472 U.S. 511, 542 (1985). As an essential component of that tenet, the Court has decreed that qualified immunity should be resolved "at the earliest possible stage in litigation," *Hunter v. Bryant*, 502 U.S. 224, 227 (1991); *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001), and that "peculiarly disruptive" activities like discovery should not take place until the immunity question is resolved. *Mitchell*, 472 U.S. at 526. Recognizing that this Court's decisions concerning the application of

Rule 8(a)—both in the qualified immunity context and elsewhere—are "not readily harmonized," *Iqbal v. Hasty*, 490 F.3d 143, 153 (2d Cir. 2007); App. 161a, the Court of Appeals essentially begged this Court for guidance and clarification on this critical area of law. *See id.* at 178; App. 213a (Cabranes, J., concurring) (these issues "fully deserve reconsideration by the Supreme Court at the earliest opportunity").

Yet Respondent largely ignores these points—particularly the policies that form the foundation of qualified immunity—and instead suggests that no clarification is needed, nor is there any conflict in the circuit courts of appeals. Under Respondent's view, the decisions of this Court, particularly *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), and *Erickson v. Pardus*, 127 S. Ct. 2197 (2007), eliminate any uncertainty and effectively permit a plaintiff to defeat a qualified immunity defense at the motion to dismiss stage even where a complaint contains merely conclusory allegations against a supervisory official.[1]

Given the many decisions of this Court that emphasize the importance of the qualified immunity defense, it cannot be that this Court meant to eviscerate that defense at the motion to dismiss stage by issuing a series of unrelated rulings in various

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[1] Respondent's reliance on *Swierkiewicz* is misplaced because that was a garden-variety Title VII case with no applicability to qualified immunity issues. *Erickson*, a 42 U.S.C. § 1983 case, is admittedly more on-point. However, the requirement stated therein that "[s]pecific facts are not necessary," only "fair notice," 127 S. Ct. at 2200, remains perplexing because it was made without reference to the longstanding qualified immunity precedent of this Court.

areas of law on the meaning of Rule 8(a). Surely if this Court meant to do that, instead of employing this kind of backdoor mechanism, it would say so explicitly and explain its rationale. To the contrary, this Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter*, 502 U.S. at 227 (citing cases). As it has explained, this approach is necessary to "weed out suits . . . without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

What Respondent's arguments *do* highlight, when considered along with the analysis of the Court of Appeals, is that clarification in this case is necessary, and the petition for a writ of certiorari should therefore be granted.

2. The Solicitor General also has a petition for a writ of certiorari pending on behalf of John D. Ashcroft and Robert Mueller, who are, respectively, the former Attorney General and the Director of the Federal Bureau of Investigation ("FBI"), which arises out of the same appeal. *See* No. 07-1015. In response to Hasty's petition, the Solicitor General notes that it "overlaps" with the petition for Ashcroft and Mueller on the "important question" of conclusory allegations without alleged direct involvement by supervisory officials. The Solicitor General argues that "th[is] question warrants this Court's review," and notes that this Court "may wish to consider that important question" both from the perspective of "high-ranking officials like the Attorney General and the Director of the FBI . . . *as well as* the lower-level supervisors like the warden of a detention facility," such as Hasty.

Solicitor General's Brief in No. 07-827 at 2 (emphasis added).

Petitioner Hasty strongly encourages the Court to do so. Although described by the Solicitor General as a "lower-level" official, Hasty is in fact "lower level" for these purposes only in relation to the Attorney General and the Director of the FBI. And, indeed, as the warden of a large detention facility with hundreds of inmates and detainees such as the MDC, Hasty is no less the focal point of frivolous law suits than the Attorney General or the head of the FBI, albeit in different contexts. In fact, due to their higher visibility within the prison system, it is even more likely that wardens such as Hasty would be subjected to burdensome litigation on a regular basis. Thus, Hasty's need for qualified immunity is no less critical than that of higher-level government officials, and he is entitled to the protection qualified immunity affords to supervisory government officials at all levels.

CONCLUSION

The petition for a writ of certiorari should be granted for the foregoing reasons, for the reasons stated in Hasty's petition, and for the reasons articulated in the Solicitor General's petition, No. 07-1015.

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